

GM PLEASSED WITH UPTAKE OF PENSION CONVERSION OFFER / PAGE 3

INSURANCE RATES RISE, BUT PACE OF INCREASES STARTS TO SLOW / PAGE 3

NEW FIRM SPEEDS APPROVAL OF MEDICARE SET-ASIDES, BUT COSTS RISE / PAGE 3

inBrief

AIG reports \$7.65B in net income

American International Group Inc. reported \$7.65 billion in net income for the nine months ended Sept. 30, compared with a \$272 million loss for the comparable period a year ago. For the third quarter, the insurer reported \$1.86 billion in net income, compared with a \$3.83 billion loss for the same quarter in 2011. In its property/casualty operations, AIG reported \$2.82 billion in pretax income for the nine-month period, a 181.2% improvement from the comparable period a year ago. It reported a 103.2% combined ratio for the nine months, compared with a 109.3% combined ratio for the same period a year ago.

See **IN BRIEF** page 29



SPOTLIGHT

EMPLOYMENT LIABILITY RISK MANAGEMENT

EEOC rules make employers rethink background check policies; obese workers filing more bias claims; FMLA rules cause confusion. **PAGE 11**

CATASTROPHES

Up to \$20B in Sandy losses

Tighter conditions, property rate hikes expected to follow

By **BILL KENEALY**

Superstorm Sandy, which slammed the Northeast and Mid-Atlantic last week, is likely to firm property/casualty insurance rates and lead to tighter terms and conditions, experts say.

The slow-moving, giant storm hit New Jersey the hardest, but heavy rain and, in some cases, record storm surge inundated many locations along the East Coast. Disruptions ranged from New York's subway system to up to three feet of snow in West Virginia. Its effects were felt as far west as Chicago.

Millions of U.S. customers still were without electricity late last week from the storm that caused at least 170 deaths in the Caribbean, United States and Canada.

While analysts said storm-related losses were within insurers' financial ability to absorb them, certain insurers could be hit harder (see story, page 26).

Insured losses were estimated at \$10 billion to \$20 billion, and economic losses at \$30 billion to \$50



AP PHOTO

INSIDE: Most insurers able to absorb losses from Sandy; energy, marine losses also could be substantial. **PAGES 26, 27**

Superstorm Sandy inflicted its greatest damage on New Jersey, including the Jersey Shore.

toll, said Serge Troeber, New York-based chief underwriting officer at Swiss Re Corporate Solutions.

"Hurricane Sandy's record storm surge will possibly be a major driver for commercial insurance claims, as these policies typically provide cover for wind, surge and flood," Mr. Troeber said, noting that the breadth of inland wind damage also would present a

See **SANDY** page 26

Business interruption likely to account for big portion of claims

By **MIKE TSIKOUidakis**

Business interruption claims look to be a significant portion of insured losses that Superstorm Sandy inflicted on the East Coast last week and may lead to numerous coverage disputes.

Early estimates of business interruption losses as a result of Sandy were approximately 30% of insured losses, which catastrophe modeling firms estimated at \$7 billion to \$20 billion late last week.

Industry experts compared the proportion of Sandy's potential business interruption losses to previous catastrophes, including last year's earthquake and tsunami in Japan and flooding in Thailand.

Brian C. Schneider, senior director of insurance at Fitch Ratings Inc. in Chicago, said business interruption losses accounted for a significant portion of the combined \$50 billion of insured losses in Japan and Thailand.

Business interruption losses after the Sept. 11, 2001, terrorist

See **FLOODING** page 26

CYBER LIABILITY

S.C. data breach highlights public entity risks

By **RODD ZOLKOS**

A massive South Carolina Department of Revenue data breach that exposed information on individual and corporate taxpayers will be a wake-up call to public entities across the country that store vast

amounts of information but likely have inadequate security protections in place, information security and information law experts say.

"I don't see how it couldn't be," said Jim Whetstone, senior vice president and U.S. technology and

privacy manager at Hiscox Inc. in Chicago. "I've got to think government officials across the country are looking at this and asking questions."

"The message from this is other states need to take heed and learn a lesson and be thankful it wasn't them because next time it might be," said Richard J. Bortnick, member of the law firm Cozen O'Connor in West Conshohocken, Pa. "And it's not just states. It's all public entities."

The South Carolina Department of Revenue announced late last month that approximately 3.6 million Social Security numbers and 387,000 credit and debit card numbers were exposed in a cyber attack. State officials later

revealed that some companies' business identification numbers also had been stored in the database that was breached.

In a statement, the state said that on Oct. 16 investigators uncovered two attempts to probe the system in early September, and later learned that another attempt had been made in late August. Two other breaches occurred in mid-September, according to the state, with the hacker apparently then obtaining data for the first time.

The state said the vulnerability in the system was closed Oct. 20, and the system now is believed to be secure.

See **BREACH** page 28

INDEX

Advertiser Index	27
Business Resources	24
Commentary	8
End Page	30
Opinions	8
Mid-Market Executive	6
Products & Services	9
Public Notices	24
Up Close	24

Board Meeting

M&A Committee Report

- Due Diligence
- International Expansion
- Regulatory Concerns
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PENSIONS

GM pleased with rate of lump sum takeup

30% of eligible retirees accept automaker's offer

By JERRY GEISEL

The roughly 30% of eligible salaried retirees who have accepted General Motors Co.'s offer to convert their monthly annuity to a lump sum benefit is a solid response to the trailblazing approach that other companies are expected to follow, observers say.

That offer, which GM announced in June, was extended to salaried employees who retired after Oct. 1, 1997, and before Dec. 1, 2011. In all, the offer was made to about 44,000 participants, of which about 13,000 accepted.

In addition, as the second part of its pension de-risking strategy, GM purchased a group annuity from Prudential Insurance Co. of America.

The Prudential annuity replaced benefits that salaried employees who retired before Oct. 1, 1997, received from GM, as well as retirees who declined the lump sum conversion offer.

GM said the twin de-risking approaches have dramatically reduced the size of its salaried pension plan. On Jan. 1, the plan had \$35.9 billion in benefit obligations and \$33.3 billion in assets. Now, GM estimates plan obligations have fallen to \$9.2 billion and assets to \$6.1 billion.

GM is the first to report the percentage of plan participants accepting an annuity-to-lump-sum conversion offer. The automaker, along with Ford Motor Co., were the first to take such an approach to reduce its pension risks. Since then, about a dozen other

employers have made annuity conversion to lump sum benefit offers, though those offers have involved participants who have earned a benefit, but are not yet receiving them.

A GM spokesman said last week that while the automaker didn't have a specific acceptance rate in mind, the company is pleased with the results.

Others note that predicting an acceptance rate in such situations would have been difficult because — in the absence of Internal Revenue Service guidance — no employer had made such an offer involving participants receiving benefits before GM and Ford. Prior lump sum offers have involved plan participants not yet receiving benefits.

"There was zero historical experience to draw from," said Jason Richards, a senior consultant at Towers Watson & Co. in St. Louis.

In July, however, the IRS said such offers involving retirees receiving monthly annuities do not violate federal pension law or regulations. The IRS determination came in two private letter rulings.

The IRS does not identify those requesting private letter rulings, but their release came after GM and Ford announced they would give certain salaried retirees a one-time right to convert their annuities to lump sums.

In other situations, such as offering a lump sum payment to employees who terminated employment but are not yet receiving annuities, an acceptance rate of 50% to 60% would not be uncommon, experts say.

"In dealing with a number of these situations, Mercer has seen term vested election rates in the ballpark of 50% to



AP PHOTO

GM is the first to report the percentage of salaried retirees who are accepting an annuity-to-lump-sum conversion.

60%, and we would expect that participants already in receipt of annuities would be less likely to elect lump sums," said Sean Brennan, a principal with Mercer L.L.C.'s financial strategy group in New York. "Based on our broad, overall experience, 30% acceptance for this group would be on the higher side of an expected range."

The acceptance rate for retirees already receiving benefits compared with younger plan participants would be lower because the retirees likely doubt they would have enough time to significantly boost the total through investments, consultants say.

"A 75-year-old wouldn't feel the same opportunity exists" to earn investment income as a 45-year-old, Mr. Richards said.

Through de-risking approaches, employers can reduce their exposure to unpredictable pension plan contributions due to fluctuating interest rates and investment results, as well as reduce premiums they pay to the Pension Benefit Guaranty Corp.

PROPERTY/CASUALTY INSURERS

Insurance rates rise again in Q3, but pace slowing

By MATT DUNNING

Prices in the commercial property/casualty market continued firming in the third quarter of 2012, albeit at a slightly slower pace than in prior quarters this year, according to the Council of Insurance Agents & Brokers.

The Washington-based Council's quarterly Commercial P/C Market Index Survey, released last week, indicated that pricing across small, mid-size and large commercial accounts rose by an average of 3.9% from July to September. The rate of growth was slightly lower than the 4.4% and 4.3% average increases recorded in the first and second quarters of the year, respectively.

However, this year's third quarter pricing growth still outpaced the average increase of 0.9% and 2.7% witnessed in third and fourth quarters of 2011, respectively, the council's report said.

"Generally, the rate of increase was about the same in this quarter as what we saw in the second quarter," said Coletta Kemper, the council's vice president of industry affairs. "What we're seeing more of all across the country is tightening of terms and conditions, attachment points and retention levels. Insurers are really paying a lot more attention to underwriting."

Nationwide, Ms. Kemper said accounts renewing their business seemed to be taking the brunt of the pricing increases.

"New business is still relatively competitive, but insurers are looking much harder for good business, meaning accounts that don't have a lot of losses in their history," she said.

In all regions of the country, the majority of insurance brokers surveyed for the report indicated that pricing had remained flat or increased by less than 10% across all property/casualty lines. However, significant percentages of brokers surveyed said they had seen pricing rise by as much as 20% for a handful of coverages, including commercial property, directors and officers liability, employment practices liability and workers compensation.

Pricing increases appeared to be sharpest in the Southwest region, which includes Southern California, Arizona, New Mexico, Oklahoma and Texas. In those areas, nearly half of brokers surveyed said they'd seen D&O pricing increase as much as 20% from July to September, compared with 13% of brokers nationwide. Thirty-eight percent of brokers said they'd seen similar pricing growth in pricing for EPL coverage in the Southwest, compared with 15% at the national level.

Ms. Kemper said the region's comparatively high unemployment rates and other macroeconomic factors were likely key drivers of the EPL and D&O increases reported in the Southwest.

3.9%

The Washington-based council's quarterly Commercial P/C Market Index Survey indicated that pricing across small, midsize and large commercial accounts rose by an average of 3.9% from July to September.

20%

Significant percentages of brokers surveyed said they had seen pricing rise by as much as 20% for a handful of coverages.

WORKERS COMPENSATION

Firm speeds resolution of set-aside claims

By SHEENA HARRISON

Experts in Medicare Secondary Payer compliance say it has become easier for insurers and employers to settle some workers compensation claims since the Centers for Medicare and Medicaid Services began using a new contractor to review Medicare set-asides.

However, variations in projected medical costs could mean that employers pay higher-than-projected settlements for Medicare-related workers compensation claims, even though the cases are closing faster.

"The decreased turnaround time solves one problem. It does not solve the problem of the high MSA amounts that CMS has been coming back with on the past two to three years," said

Daniel Anders, compliance director for Medicare compliance firm MedAllocators Inc. in Lawrenceville Ga.

Medicare set-asides are funds used in workers comp settlements to pay future medical costs of Medicare-eligible workers. CMS uses a contractor to conduct the approval process for set-asides, which determines how much money should be placed into the set-aside account.

Provider Resources Inc. of Erie, Pa. began reviewing Medicare set-aside agreements in July. Approvals previously were handled by Annapolis Junction, Md.-based Lifecare Management Partners L.L.C.

Sources say the review time has dropped to about 30 business days in the past several months, down from six

months to a year under Lifecare Management.

Previous delays likely occurred because Lifecare Management's contract provided staff to handle only about 1,700 cases a month compared with 2,200 to 2,500 monthly set-aside submissions now handled by Provider Resources, said Kimberly Wiswell, managing director of CompProjections in Agoura Hills, Calif., the Medicare set-aside division of managed care organization CompPartners Inc.

Provider Resources appears to have more staff and a more flexible contract that allows them to tackle high submission volumes, she said.

"For the most part, I think the new

See **MEDICARE** page 28

WORKERS COMPENSATION

Nurses' involvement keeps comp costs down

By **ROBERTO CENICEROS**

Assigning nurses — not just adjusters — to manage all workers compensation claims helped one large employer cut costs and enable its employees to tap the company's full array of health and productivity benefits.

What started as an effort to improve the medical handling of Textron Inc.'s workers comp claims has evolved into the integrated coordination of programs available for workers whether they suffer a non-occupational disability, a work injury or an illness handled by the company's group health plan, said Dan Shaughnessy, Textron's director of disability and wellness programs.

Providence, R.I.-based Textron is a Fortune 500 company with

about 25,000 U.S. employees and thousands more spread across 25 countries. Its businesses include Bell Helicopter and Cessna Aircraft Co.

Like Textron, other large employers with diverse workforces spread across many locations struggle to help employees access their health and productivity benefits, said Kimberly Mashburn-Lee, vice president of strategic client solutions at Pacific Resources Benefits Advisors L.L.C. in Chicago.

With so many benefits and services available, such as wellness coaching, employee assistance programs and disability management, it often is challenging for employees to know where to turn, especially during stressful events, Mr. Shaughnessy added.

"Not everyone remembers all the benefits they have" when under duress, he said.

Consequently, employers spend large sums for programs that employees don't use, experts said. That hurts worker productivity and the company's bottom line. It also diminishes the return on investment that companies derive from their health and productivity programs.

But Textron has increased worker use of its health and productivity programs by 50%.

That accomplishment evolved from a late 2005 effort when Textron evaluated its third-party administrator contract and decided it wanted nurses managing each workers comp case from inception.

See **TEXTRON** page 29



BELL HELICOPTER/TEXTRON INC.

Providence, R.I.-based Textron is a Fortune 500 company with about 25,000 U.S. employees and thousands more spread across 25 countries. Its businesses include Bell Helicopter and Cessna Aircraft Co.

PROPERTY/CASUALTY INSURERS



MICHAEL MARCOTTE

PCI President and CEO David A. Sampson addressed the group during its annual meeting in Dana Point, Calif., last week.

Economy, regulations could hamper industry

By **MARK A. HOFMANN**

DANA POINT, Calif. — Insurers are "well-positioned" to help policyholders deal with Superstorm Sandy, according to the president and CEO of the Property Casualty Insurers Association of America.

During his opening address to the group's annual meeting in Dana Point, Calif., last week, PCI President and CEO David A. Sampson noted that the association had chosen its theme — "Risk and Resilience" — in February. "It looks very prescient given the events" that have unfolded since

then, he said.

"I'm very confident insurers are well-positioned" to assist their policyholders in the wake of Sandy, he said. He pointed out that the meeting itself — held last week in Dana Point, Calif. — was not immune to the storm's impact, as the storm and travel disruptions affected attendance.

But dealing with a monster storm is not the only issue confronting insurers, said Mr. Sampson. The intersection of politics and the economy has become

See **PCI** page 29

Errors & Omissions

Former Van Gilder Insurance Corp. CEO Michael Van Gilder has taken an indefinite leave of absence as an employee of the company and as a member of its board of directors, effective immediately, following his indictment last week on insider trading charges, the company said. A story on page 12 was printed before Friday's announcement.

RISK MANAGEMENT

ERM adds value to businesses

Successful programs show relevance of risk management

By **RODD ZOLKOS**

SAN ANTONIO — Enterprise risk management programs don't just help organizations manage risks more effectively; a well-developed ERM program can help improve a businesses performance as well.

Speaking last week at the Risk & Insurance Management Society Inc.'s 2012 Enterprise Risk Management Conference in San Antonio, Brian D. Thelen, general auditor and chief risk officer for General Motors Co. in Detroit, said his company looks to its ERM program to give it a leg up on competitors.

"We want this to be a competitive advantage for us," Mr. Thelen said. "We're not just looking at this as wanting to play defense. We want to play offense."

Mr. Thelen said that when he came into his CRO role at GM, one of his priorities was to ensure that the company's risk management operation was providing a value-added benefit to the organization.

"What we're trying to do is make sure we're relevant," Mr. Thelen said.

"The evolution of risk management goes through three stages from the traditional to the integrated to the enterprise risk management approach," David T. Smith, divisional vice president, risk management, at Family Dollar Stores in Matthews, N.C., said during another session discussing proving ERM's value

through objective measurement.

"In the integrated approach, the insurance piece, the risk transfer, just becomes a safety net. It's not primary like in the traditional approach," Mr. Smith said. "The ERM process broadens the scope of risk management to address strategic and operational risk as well."

RIMS ERM CONFERENCE DRAWS 200 ATTENDEES

SAN ANTONIO — The Risk and Insurance Management Society Inc.'s 2012 Enterprise Risk Management Conference drew approximately 200 attendees to the Grand Hyatt San Antonio Hotel in San Antonio on Oct. 29 and 30.

During the conference, RIMS presented its annual Enterprise Risk Management Award of Distinction to the YMCA of Greater Toronto, with an honorable mention awarded to Houston-based Sysco Corp. The award is intended to honor organizations that have created value through their ERM programs.

For information about next year's RIMS ERM conference, visit www.rims.org.

— By Rodd Zolkos

On the same panel, Gary J. Bierc, CEO at rPM3 Solutions L.L.C. in Pasadena, Md., said expanding a total cost of risk approach into an enterprise total cost of risk calculation allows risk managers to effectively communicate the value of their ERM activities to their organizations' upper management.

"The environment we're living

in today is far more rich in risk than the environment when our accounting systems were developed" long ago, Mr. Bierc said. "If you're going to be looking at cost of risk this way, you have to have a certain focus on risk and enterprise risk management," Mr. Bierc said, considering cost of risk on the basis of a broad strategic view rather than a process-focused view.

Among other things, that might mean including business activities in an enterprise total cost of risk analysis that would not be considered part of a total cost of risk measurement, such as marketing expenditures or human resources costs, he said.

"Risk is the level of uncertainty around corporate performance," Mr. Bierc said. "At the end of the day, we're all trying to drive performance at our companies. That's why we're doing this."


As organizations craft ERM programs, it's essential that the programs fit their organizations' cultures, according to another group of speakers.

At accounting and advisory firm Eide Bailly L.L.P., the firm's partnership structure was among factors to be considered in moving toward ERM, said Mary Peter, the firm's Minneapolis-based director of enterprise risk management.

"Working with a partnership is much, much different than a corporation. You have lots of bosses," Ms. Peter said. "And if they're not on the same page, you're going in a lot of different directions."

To address those issues, it was

See **ERM** page 28



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Mid-Market EXECUTIVE

Helping C-level executives at midsize firms overcome critical risk and benefits challenges

K&R cover tackles range of risks

In addition to ransoms, counseling, security advice provided with coverage

By JOANNE WOJCIK

Often referred to as “sleep well insurance,” kidnap and ransom coverage goes well beyond indemnifying policyholders for ransoms paid to kidnapers.

Aside from indemnification for ransoms paid, K&R insurance also provides employers with access to security consulting services before, during and after the kidnapping of an employee.

K&R coverage pays for the cost of investigating and responding to extortion attempts and threats, as well as any legal defense costs a company may be obligated to pay if it is sued by victims, their family members or shareholders as a result of an incident.

In addition, K&R insurance picks up the tab for certain related expenses, such as the cost of rewards to identify or find the perpetrators, travel, the victim’s salary while that person is being held, the cost of paying replacement workers or even the salary of a family member who is forced to take time off from work while their loved one is held by kidnapers.

It also includes personal accident, evacuation and repatriation coverage in case a victim is maimed, disabled or killed, as well as coverage of the costs of post-event psychological counseling and physical rehabilitation.

Limits can go as high as \$100 million (see box).

While most U.S. companies usually purchase the coverage when they begin to enter foreign markets, it applies domestically as well.

In fact, some insurers, such as Hiscox Inc., call K&R coverage “a total security solution” for companies that may become exposed to nefarious activities ranging from actual abductions to attempted extortions and threats to harm their employees.

“Where somebody is threatened in any way, it’s covered,” said Jeremy Lang, senior vice president and manager of U.S. kidnap and ransom at Hiscox in New York.

After an event has occurred, the policy also will cover the cost of psychological counseling and rehabilitation. “Because the incident can be so traumatic, employees very often need to take advantage of that part of the policy,” he said.

The Hiscox policy also includes a “prevention fund” that “can be used by the policyholder to work with a response firm on such things as crisis management plans, travel plans and procedures, etc.,” Mr. Lang said.

“The best way to survive a kidnap is by not being kidnapped in the first place,” said Jeroen Meijer, vice president and director of consulting at Control Risks Group Holdings



Hearst kidnapping accelerated U.S. takeup

Kidnap and ransom insurance was introduced by underwriters at Lloyd’s of London in 1932 in response to the kidnapping and murder of the infant son of famed aviator Charles Lindbergh.

However, the policies did not gain widespread appeal among corporations and individuals until the mid-1970s after the kidnapping of newspaper heiress Patty Hearst.

Today, most Fortune 500 companies include K&R coverage in their insurance portfolios, and a growing number of middle-market firms are purchasing it as they expand internationally, experts say.

K&R coverage limits generally start at \$1 million, but can go as high as \$100 million if multiple insurers are involved. Premiums vary based on the amount of the exposure.

Though Lloyd’s continues to be the K&R insurance market leader, either insuring or reinsuring 80% of K&R policies written, numerous domestic

Ltd., a Washington-based security firm that provides services often included as part of K&R coverage.

“We look at this risk from different angles, helping clients develop security protocols and providing training to employees to minimize their security risk through behavior change and by being alert to potential risks,” Mr. Meijer said.

For example, “we teach employees how to minimize routines to reduce the risk of

insurers also offer this type of insurance. They include New York-based Chartist Inc., Warren, N.J.-based Chubb Corp. and Liberty International Underwriters, a unit of Boston-based Liberty Mutual Insurance Group.

K&R coverage is essential to protect against reputational damage and assure the safety of employees while traveling internationally, said Chris Holt, consulting director of crisis management in Towers Watson & Co.’s London office. He recommends that companies purchasing K&R insurance extend the coverage to all employees, not just directors and officers.

“If someone is unwell while traveling in Germany, it doesn’t attract the same attention or potential for reputational damage as something like a kidnap or the way an organization responds to a terrorist incident,” Mr. Holt said. “It also goes a long way toward maintaining the confidence of the workforce.”

— By Joanne Wojcik

being taken hostage, like not always leaving their hotels at the same time and walking the same route,” he said.

Security consulting firms such as Control Risk also help K&R policyholders manage kidnappings after they occur, providing advice and coaching from the sidelines, Mr. Meijer said.

Security consultants need to be discreet so kidnapers do not suspect the existence of a K&R insurance policy, said Andres

Franzetti, engagement manager, partner solutions, at Clements Worldwide, a Washington-based managing general agency that underwrites K&R coverage on behalf of numerous insurers and Lloyd’s of London.

In fact, insurers almost universally require companies as a condition of coverage to keep the existence of K&R policies confidential, even from their own employees.

“Kidnappers can usually tell if there’s a professional involved. It can increase the potential for a higher ransom demand and complicate rescue efforts,” Mr. Franzetti said.

Moreover, when employees are aware they are covered by K&R insurance, they tend to take more risks that potentially could make them targets of kidnapers, Hiscox’s Mr. Lang said.

Rather than informing traveling employees about the existence of K&R coverage, Hiscox recommends that employers provide employees a phone number to the response firm included with the kidnap insurance. “Really what you’re paying for is a sense of security,” Mr. Lang said.

The security consulting and response firm usually provided as part of K&R coverage also helps with negotiations.

“The consultant will begin negotiations high enough so that they hopefully won’t harm the victim, and then move the ball along to meet a price that everyone agrees on,” said Thomas Dunlap, assistant vice president and Southeast and Southwest regional manager for global crisis management at Liberty International Underwriters in Dallas.

The security firm also conducts a post-incident evaluation to help companies establish protocols to ensure that such events don’t happen again. “How else do you forestall them from kidnapping another employee or even recapturing the person who was kidnapped initially?” Mr. Dunlap asked.

Though called kidnap and ransom coverage, most K&R policies also respond to wrongful detention, hijackings and extortion, experts note. In some cases, K&R policies will cover cyber extortion attempts as long as there is a ransom demand associated with them.

“More than 40% of the incidents responded to under our policies are actually extortions,” said Sarah Katz, assistant vice president in the kidnap, ransom and extortion department at Victor O. Schinnerer & Co. Inc., a division of Marsh Inc. in Chevy Chase, Md. Extortion “is a growing problem in Latin America and Mexico where companies get shakedowns from local criminal gangs,” she said.

Threats also are covered by K&R coverage, she added.

“Say a company in Mexico has a location there and a manager has a note pinned to his door with a dagger saying they know where he lives. Or it could be an email threatening to harm an insured person, or threats to reveal confidential information,” Ms. Katz said.

K&R insurance “will cover the crisis response team that would conduct a threat assessment and also cover the costs of putting temporary security measures in place,” she said.

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Opinions

EDITORIAL

Growing storms need new plans

Hurricane Irene pounded the Northeast last year, causing 56 deaths and \$4.3 billion in U.S. insured losses. Meteorologists classified it a Category 1 hurricane at landfall.

Only a year later, Sandy, a tropical storm when it came ashore last Monday in Atlantic City, N.J., again ravaged the Northeast. The U.S. death toll late last week stood at more than 100, with 40 of those fatalities in New York City alone. Catastrophe modelers have issued estimates of insured losses that vary between \$5 billion and \$20 billion.

A hurricane and monster tropical storm striking the Northeast in back-to-back Atlantic hurricane seasons? What's going on here? It doesn't take a meteorology degree to understand that something has changed dramatically in weather patterns, altering the frequency and severity of destructive storms in states outside of Hurricane Alley in Florida and along the Gulf Coast.

Maybe two major storms a year apart doesn't qualify as a trend, and neither Irene nor Sandy were so-called one-in-100-year storms: A storm that creates the same scale of losses as Hurricane Andrew in 1992 or Katrina in 2005, hasn't made an appearance in the Northeast yet.

Scientists, however, are predicting that it's not a matter of if, but only when, that could occur. We'll leave the storm predictions to the weather experts, and we won't draw any conclusions regarding the ongoing debate about the possible effects of global warming on these changing weather patterns.

Here's the bottom line, though: A senior executive with AIR Worldwide, one of the nation's leading catastrophe modeling firms, last week during a panel discussion at the 2012 conference of the Property Casualty Insurers Association of America called Sandy "more significant" than Irene but a "moderate event" in terms of the tab for total damages that private insurers face. The Big One in the Northeast, the insurance industry fears, could result in \$200 billion of insured losses, the AIR exec said.

It's high time the insurance industry makes a bold move — to bring together business leaders, the smartest weather scientists and local, state and federal regulators to start working toward a comprehensive infrastructure assessment and a unified hurricane mitigation plan for the Northeast.

LETTERS

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SCHILLERSTROM



COMMENTARY

P/C issues face uncertain future

No matter who wins this week's elections, some of the property/casualty insurance-related issues likely to emerge in Washington during the next couple of years already are known.

Probably the most important of these to risk managers is extension of the federal government's terrorism insurance backstop, which initially was created by the Terrorism Risk Insurance Act of 2002. The program has been extended twice, first in 2005 and then again in 2007, and is slated to expire on Dec. 31, 2014.

Extending the program the first couple of times wasn't easy, and there's no reason to expect doing so will be any easier this time around. In fact, with both parties paying at least lip service to reducing federal spending, the program may be facing its most difficult renewal yet.

The program, which has never cost more than routine administrative costs, has come under fire as a form of corporate welfare from such disparate sources as the Wall Street Journal and the Consumer Federation of America. While former Massachusetts Gov. Mitt Romney's views on the backstop aren't known — it's not exactly the kind of issue that energizes the base of any party — the current administration hasn't been terribly enthusiastic about it.

That presages a long, hard fight for extension. Backstop supporters will have to have their strategy in place much sooner than later.

In addition, full implementation of the Dodd-Frank Wall Street Reform and Consumer Protec-

tion Act will remain an issue. Property/casualty insurers seem to have pretty much won the argument that they don't present a systemic risk to the national economy, but the final rules haven't been set out. If the Republicans retain control of the House, which seems likely, and gain control of the Senate, which seems considerably less likely, there could be a serious effort to repeal at least part of the law, which in turn would lead to a battle with the White House if the president's name continues to be Barack Obama. A President Romney would no doubt be more amenable to changing the law.

A sure bet is that there will be a new Treasury secretary. Current Secretary Tim Geithner has said he plans to leave no matter who wins the presidency. The president's decision on who should head the department — regardless of whether that's President Obama or a President Romney — could have a critical effect on insurance.

Then there's the question of the Federal Insurance Office. FIO Director Mike McRaith, an Obama appointee, has won high marks from all sides for his performance. Would he stay if Mr. Romney wins? And if not, who would be nominated to head the office?

We won't know the answers to these and other questions for some time. All that is certain is the uncertainty over what the answers ultimately will be.

Contact: mhofmann@businessinsurance.com



MARK A. HOFMANN
SENIOR EDITOR

Products & Services

Guy Carpenter offers risk management service

Guy Carpenter & Co. L.L.C. has launched a new portfolio management system for insurers.

Called GCPProfitPoint+, the program offers portfolio planning and point-of-sale capabilities to allow insurance companies to set, calibrate and monitor their risk management strategy, the broker said.

The system includes several inputs such as cat model loss opinion, non-cat loss experience, expenses, reinsurance cost, and capital allocation, according to John Tedeschi, head of GC Analytics-Americas at Guy Carpenter. That information is integrated into analytical engines, business intelligence platforms, and geographical information systems for the insurer to analyze.

"With historically low investment returns and lingering weakness in the economy, insurers are faced with increasing pressure to drive profitability through solid underwriting results," said Andrew Marcell, CEO of U.S. operations for Guy Carpenter. "In an industry predicated on data analysis, insurers often find themselves inundated with massive amounts of information that is fragmented and, therefore, not easily translated into actionable business intelligence."

For more information, contact Subhashish Dutta, senior vice president and head of global research and development, at 917-937-3191 or sdutta@guycarp.com.

BrokersLink launches supply chain service

Global broker network BrokersLink has launched a supply chain risk management service that will provide members access to tools intended to help clients identify and quantify their supply chain risks.

The service, BrokersLink Specialized Resources, introduced at BrokersLink's annual members conference in Madrid, includes two questionnaires designed to assess supply chain risk preparedness. Once supply chain exposures are identified, the service will make available a range of specialist services that can be used to mitigate risks.

Specialist companies participating in the BrokersLink Specialized Resources service include catastrophe risk services from AIR Worldwide Corp., claims management assistance from BDO Consulting, and risk engineering services from Herco Risk Consulting and Paragon Risk Engineering.

Other service providers include business continuity assistance from Risk Solutions International L.L.C., human resources and risk management services from Towers Watson & Co., reinsurance brokerage from Cooper Gay and retail brokerage assistance from Crystal & Co.

BrokersLink Specialized Resources also will provide a range of consulting functions for network members.

Aon, RPX Insurance offer 'patent troll' protection

A new non-practicing entity patent insurance policy that is designed to manage and mitigate

the growing issue of "patent trolls" — firms that are created for the sole purpose of suing companies over their patents — will offer up to \$2.5 million in coverage, Aon Risk Solutions announced.

The policy is underwritten by RPX Insurance Services Inc., a unit of San Francisco-based RPX Corp., a patent consulting firm, which developed the product with Aon Risk Solutions, a unit of London-based Aon P.L.C. Aon Risk Solutions will exclusively distribute the insurance, which is designed for firms with \$1 billion or less in revenue, said Shawn Ram, San Jose, Calif.-based managing director and technology practice leader for Aon Risk Solutions.

Non-practicing entities are considered a problem in the patent arena. According to RPX, the number of patent infringement lawsuits filed by non-practicing entities nearly tripled in size to more than 1,300 in 2011 from about 500 in 2005.

Mr. Ram said that until now, insurers "have struggled to develop a viable product around patent trolls." RPX, however, has a "tremendous amount of data" that has been leveraged "to build a product that is viable and actually makes sense."

Mr. Ram said deductibles will vary and, while \$2.5 million in coverage is available initially, there are "clearly opportunities to increase limits."

Starr Aviation launches new broker portal

Starr Aviation has launched a broker portal, which debuted at the National Business Aviation Association Conference in Orlando, Fla.

Called Starrlink, the portal gives agents access to all past issued policy documents, including endorsements, certifications as well as the entire policy as a whole, according to the division of Starr Indemnity & Liability Co. Brokers also can issue new certificates of insurance and view regularly updated accounts receivable reports.

For more information, contact Sloan Looney, business relationship manager at 469-587-1103 or at sloan.looney@starrcompanies.com.

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Former Van Gilder CEO to fight insider trading charges

Steps down as chief of family brokerage but remains involved

By JOANNE WOJCIK

Former Van Gilder Insurance Corp. CEO Michael Van Gilder pleaded not guilty last week to five counts of criminal insider trading during his arraignment in U.S. District Court in Denver.

Mr. Van Gilder, who stepped down from his post at the Denver-

based insurance brokerage in late October and voluntarily surrendered to authorities after the indictment was handed down, is accused of making approximately \$109,000 in illegal profits between Nov. 5, 2007, and Jan. 9, 2008, as a result of purchasing shares in Delta Petroleum Corp. after receiving inside information from a friend who was an executive at the Denver-based oil and gas production and exploration company.

Also during that time, Mr. Van Gilder allegedly provided insur-

ance policies for operations tied to Delta, which now operates as Houston-based Par Petroleum after emerging from bankruptcy earlier this year.

A separate civil complaint filed by the Securities and Exchange Commission in conjunction with the indictment also alleges that a co-worker of Mr. Van Gilder's at the insurance brokerage purchased 300 shares of Delta stock based on the information that Mr. Van Gilder shared with that individual, who was not identified.

Altogether, the others who benefited from Mr. Van Gilder's alleged inside information garnered approximately \$52,000 in illegal profits, the SEC said in a statement.

The investigation is continuing into other parties allegedly involved in the scheme, including two of Mr. Van Gilder's relatives and one of his co-workers, according to the indictment.

Meanwhile, Mr. Van Gilder, who was released on \$2.5 million bond after surrendering his passport to authorities, contin-

ues to work for the insurance brokerage that his grandfather founded in 1905.

"I'm still working for our company and will continue to work to maintain its leadership status in our industry," Mr. Van Gilder said in an email obtained by *Business Insurance* that was sent to his family and friends after the indictment was made public.

In the email, Mr. Van Gilder also vigorously denied the allegations against him.

Because the indictment involves Mr. Van Gilder's personal investment activities and not his work at the insurance brokerage, "nothing would preclude him from continuing to work for Van Gilder Insurance Corp.," said a spokesman for the U.S. Attorney's Office in Denver.

Moreover, "Van Gilder the brokerage is not the subject of the investigation," the spokesman said.

Van Gilder Insurance issued a statement late last month saying Mr. Van Gilder had stepped down

'I'm still working for our company and will continue to work to maintain its leadership status in our industry.'

Michael Van Gilder,
Van Gilder Insurance Corp.

from his role as CEO and that his "personal legal challenges related to the charges ... have nothing to do with the company. The company is not a subject of the investigation and does not trade in securities."

"We continue to focus on providing our clients the same level of exceptional service we have offered for 107 years. We are moving forward with a strong, stable leadership and a continued focus on customer satisfaction," said the statement attributed to Don Woods, president of Van Gilder Insurance Corp., who was named CEO of the brokerage after Mr. Van Gilder resigned.

A jury trial has been tentatively set for Jan. 2, 2013. If convicted on all five counts against him, Mr. Van Gilder could face up to 100 years in prison and \$25 million in fines.

Van Gilder Insurance is a privately held insurance brokerage with more than 130 employees. It ranks as the 94th largest broker of U.S. business with \$20.4 million in 2011 revenues, according to *Business Insurance's* latest ranking of U.S. brokers. Dell Van Gilder Jr., Michael Van Gilder's father, serves as the brokerage's chairman, and is not named in the indictment or the complaint.

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Background check policies under review by employers

Firms need nuanced approach to addressing criminal records

By JUDY GREENWALD

Employers are beginning to re-examine and revise their hiring policies in response to the Equal Employment Opportunity Commission's guidance on criminal background checks, observers say.

The agency issued guidance on background checks in April that is intended to clarify and update its policy concerning the use of arrest and conviction records in hiring decisions.

The guidance requires employers to conduct individualized assessments, including an analysis of the crime for which the employee or applicant has been convicted, and the nature of their business. Any exclusion based on criminal conduct should be job-related and "consistent with business necessity" under Title VII of the Civil Rights Act of 1967, accord-

ing to the EEOC.

Of particular concern to the EEOC, say observers, is the possible disparate impact of criminal background checks on minorities. According to the federal Bureau of Prisons, as of September, blacks accounted for 37.2% of the jail population, while representing only 13% of the total U.S. population in 2010, according to the U.S. Census Bureau.

Numerous governmental entities have removed conviction history questions from their job applications (see box, page 12).

"The idea is not to protect violent criminals. The idea is to protect people who have unrelated, irrelevant criminal histories because they came out of difficult neighborhoods," said Sheila B. Gladstone, chair of the employment law practice group at law firm Lloyd, Gosselink, Rochelle & Townsend P.C. in Austin, Texas.

But observers note that many ambiguities

See **CRIMINAL** next page

'The idea is not to protect violent criminals. The idea is to protect people who have unrelated, irrelevant criminal histories because they came out of difficult neighborhoods.'

Sheila B. Gladstone, Lloyd, Gosselink, Rochelle & Townsend P.C.

Employment
Liability
Risk Management

SPOTLIGHT

**COMPLEX RULES
ON FMLA LEAVE
STYMIE EMPLOYERS**
PAGE 14

**BIAS ALLEGATIONS
BY OBESE WORKERS
A GROWING TREND**
PAGE 20

Criminal past should not bar applicants from all positions

Employers are advised not to have a blanket exclusion on hiring people with criminal backgrounds, experts say in response to the Equal Employment Opportunity's guidance on criminal background checks.

"The one thing the policy should definitely state is that there is no automatic ban" for an applicant with a criminal conviction, said Amy L. Bess, a shareholder with law firm Vedder Price L.L.P. in New York.

Pamela Q. Devata, a partner with law firm Seyfarth Shaw L.L.P. in Chicago, said she recommends employers remove any questions about criminal history from their application forms altogether and move it to a later stage, such as after the job interview or upon a conditional offer of employment.

Michael A. Warner Jr., a partner with law firm Franczek Radelet P.C. in Chicago, said, "I would also document in your policies why certain convictions, certain types of criminal history" would disqualify a job applicant, he said.

He also suggested that employers document that the individualized assessment has been conducted, "so that if you're ever charged by the EEOC, you have a record to show you went through the process the EEOC is asking you to go through."

"Try to make sure there's a connection between a

demonstrable job requirement, and any restrictions that (the employers) are putting in place with respect to criminal history," said Marc A. Mandelman, senior counsel with law firm Proskauer Rose L.L.P. in New York.

Hotel employers, for example, "might assess the criminal history differently for a banquet employee than they might for someone who brings your tray up to your room for room service, because there's more opportunity to commit crimes" in the latter case, said Sheila B. Gladstone, chair of Austin, Texas-based law firm Lloyd, Gosselink, Rochelle & Townsend P.C.'s employment law practice group.

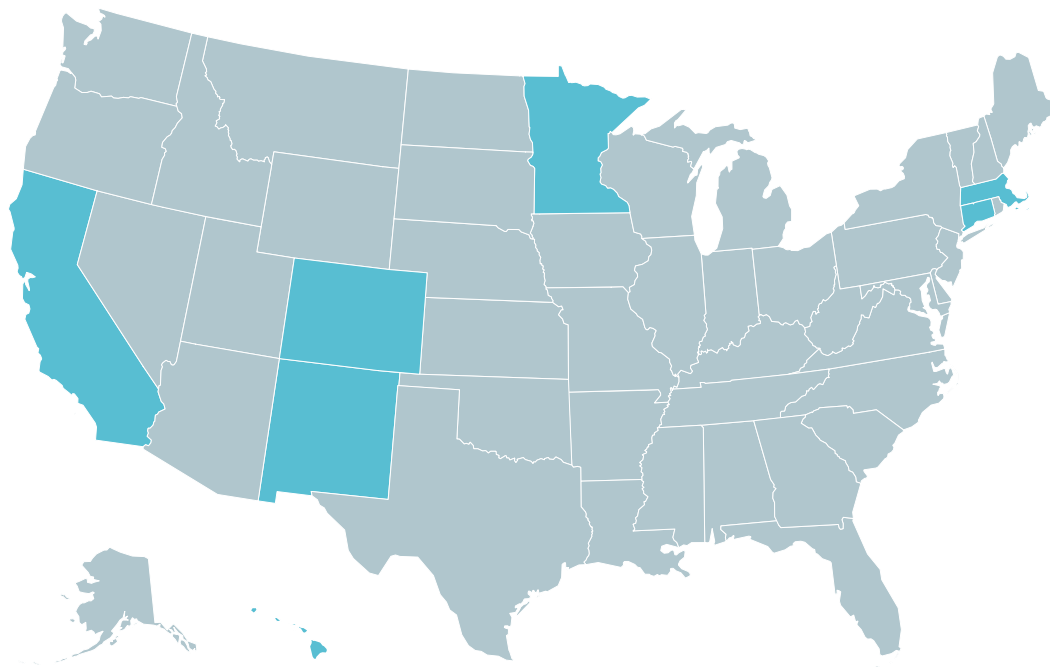
She added, however, "I still believe that employers should try to learn as much as they really can about people before they hire them, so they know what they're getting into. But don't automatically exclude people" based on a criminal history.

John R. Cavalier, an associate with law firm Cozen O'Connor P.C. in Philadelphia, stressed the need for training. It is easy to put a policy in place, he said. The problem arises when it is not followed either intentionally, or because of a failure to provide training on its implementation. "A policy is just a piece a paper if nobody knows what it means or how to follow it," he said.

— By Judy Greenwald

STATE BANS

The states of California, Colorado, Connecticut, Hawaii, Massachusetts, Minnesota and New Mexico have removed conviction history questions from their job applications.



CITY, COUNTY BANS

Cities and counties that have removed conviction history questions from their job applications

Alameda County, Calif.	Cleveland	Memphis, Tenn.	Providence, R.I.
Atlantic City, N.J.	Compton, Calif.	Minneapolis	Richmond, Calif.
Austin, Texas	Cumberland County, N.C.	Multnomah County, Ore.	San Francisco
Baltimore	Detroit	Muskegon County, Mich.	Santa Clara County, Calif.
Berkeley, Calif.	District of Columbia	Newark, N.J.	Seattle
Boston	Durham City, N.C.	New Haven, Conn.	Spring Lake, N.C.
Bridgeport, Conn.	Durham County, N.C.	New York	St. Paul, Minn.
Cambridge, Mass.	East Palo Alto, Calif.	Newport News, Va.	Travis County, Texas
Carson, Calif.	Hartford, Conn.	Norwich, Conn.	Worcester, Mass.
Chicago	Jacksonville, Fla.	Oakland, Calif.	
Cincinnati	Kalamazoo, Mich.	Philadelphia	

Source: National Employment Law Project

Criminal: Check policies under review

CONTINUED FROM PREVIOUS PAGE

surrounding the issue remain. For instance, while a bank is not required under the EEOC guidelines to hire a teller who has been convicted of embezzlement, or a day care center to hire a convicted child molester, other hiring decisions are less clear cut.

Experts advise employers to refrain from implementing blanket policies against hiring people with criminal backgrounds, among other steps (see related story).

Richard B. Cohen, a partner with law firm Fox Rothschild L.L.P. in New York, said employers are "just sitting and waiting to see how (the guidance) gets fleshed out by the EEOC." Mr. Cohen said he has not yet seen the issue reach the courts. "The guidance is relatively new," even though "it codifies maybe 20 years of previous EEOC practice."

"I think people are starting to

move towards what they think will become compliance, and at some point the EEOC is going to come out and set this in stone," said James Branda, of counsel at law firm Erlich Law Office P.L.L.C. in Arlington, Va.

Donald R. Livingston, a partner with law firm Akin, Gump, Strauss, Hauer & Feld L.L.P. in Washington, said, "A lot of employers are making sure that their assessments of criminal convictions include an individualized review of each person who has had a criminal conviction."

Michael A. Warner Jr., a partner with law firm Franczek Radelet P.C. in Chicago, said, "The biggest concern I've heard from employers is the large employers' administrative burden of conducting individualized assessments if they have a large number of hires," particularly in positions where there is significant turnover.

Observers point out that while

the guidance does not have the force of law, it usually is wise to take it seriously. While it is not a statute or regulation, "the EEOC has made it very clear that is one of their main focuses in their strategic enforcement imitative," said Pamela Q. Devata, a partner with law firm Seyfarth Shaw L.L.P. in Chicago.

Peter J. Gillespie, of counsel at law firm Fisher & Phillips L.L.P. in Chicago, said, "Complying with the EEOC guidance is a difficult process" because it "is really asking employers to take a look at specifics and to draw distinctions, and to delve deeper into what might be gray areas on these criminal background issues."

"Employers face a Catch-22," said Kelly H. Kolb, a shareholder with law firm Fowler White Boggs P.A. in Fort Lauderdale, Fla. They either change their criminal background checks policies to enforce what the EEOC wants "and as a

result risk hiring some convicted felon and incurring potentially unlimited court liability because of a rape and murder that results, or they disregard the EEOC's guidance and risk getting sued by the EEOC or by some applicant who's not hired," he said, stating he prefers the latter.

"It's a difficult battle" for employers who are "trying to balance between the EEOC's interpretation of Title VII and their ethical and legal obligations to their employees, their vendors, their customers and third parties," said Mr. Livingston. It is "very difficult for an employer to be able to make the kind of decisions that parole boards are not very good at, and that's trying to determine who is, and is not, at risk" of committing a crime.

Marc A. Mandelman, senior counsel with law firm Proskauer Rose L.L.P. in New York, said, "If you have someone who was convicted of felony drunk driving, that does raise questions about that person's ... fitness or reliability

to perform a job that doesn't necessarily require them to drive." It "becomes a judgment call as to being able to draw a connection between the requirements of the job and the particular circumstances and the criminal history that's been identified."

In light of the guidance, employers had "better tailor their policies very narrowly, with an eye towards how this particular background check relates to the position they're trying to fill," Mr. Cohen said.

A firm's policy "depends upon what the company's objective is," said Mr. Livingston. "If their objective is to avoid entanglements with the EEOC, then it's important that the employer's policy have boundaries, and that it not automatically reject all applicants who have criminal convictions, but only those with criminal convictions that can be viewed as relatively recent, and for offenses that the employer can show are relevant to the employer's business."



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Employers having hard time with complex FMLA rules

Best practices help ensure compliance, discourage abuse

By MIKE TSIKOUDAKIS

Nearly 20 years since the Family and Medical Leave Act was enacted, employers still are struggling to comply with the law.

To ensure compliance with the

FMLA, experts say employers should take care in approving or denying such leave and use the tools that the law provides to prevent misuse.

The FMLA applies to employers with 50 or more employees and allows eligible workers 12 weeks per year of protected leave for serious medical conditions, caring for an ill family member or for the birth or adoption of a child.

Employers are required to main-

tain employees' health benefits and, upon their return from FMLA leave, provide workers the same or equivalent job position.

According to the Department of Labor, termination of employees seeking FMLA leave continues to be the primary reason that employees file an FMLA-related complaint. Of the 1,889 complaints filed in 2008, the most recent year for which data is available, 757 constituted wrongful

termination complaints.

A significant difficulty that employers face is confusion over what criteria constitute a serious medical condition, experts say.

While the Labor Department, which administers the FMLA, has issued several clarifications that have broadened what could be considered a serious health condition, those clarifications only made the issue more complex, said Mary Tavarozzi, Tampa, Fla.-based North American practice leader of absence and disability management consulting and senior consultant at Towers Watson & Co.'s health care group.

"That has made it very difficult for employers to know whether or not they are being compliant

when they either approve or deny an FMLA request on the basis of whether or not it's a serious health issue," she said.

Employers also run the risk of noncompliance with the law when employees request intermittent leave, which deals with chronic health conditions such as back pain or migraine headaches. Intermittent leave tends to affect one or two days of FMLA leave time and makes assessing staffing needs difficult for employers, experts say.

"Depending on the industry, it can be very disruptive to productivity and the other employees," said Steve Wojcik, vice president of public policy at the National Business Group on Health in Washington.

For example, intermittent FMLA leave for a transportation company that schedules employees contingent on other employees' work schedules can create workflow problems and be costly to address, he said.

"It adds labor costs, of course" when companies "up their staffing to make sure that, if there is an employee who's not going to be there, they don't lose productivity," Mr. Wojcik said.

The Labor Department also has issued guidance on how FMLA

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According to the Department of Labor, termination of employees seeking FMLA leave continues to be the primary reason that employees filed FMLA complaints. Of the 1,889 complaints in 2008, the most recent year of data available, 757 constituted wrongful termination complaints.

intermittent usage should be tracked and counted, "but it has really resulted in higher levels of complexity," Ms. Tavarozzi said. "That's an enormous burden that's been placed on employers and they struggle with it."

For example, if an employer tracking its employee's FMLA leave decided the protection has been exhausted, the employer could terminate that employee and position.

"If they've miscounted that time at all, then they are not compliant and there's a whole host of things that can happen from that," Ms. Tavarozzi said.

Employers also run the risk of mismanaging the medical certification process, which requires employees to provide medical documentation and certification to obtain FMLA-protected leave, said Jeff Nowak, partner and co-chair of the labor and employment practice group for Franczek Radelet P.C. in Chicago.

"Employers often enough don't properly use all of the tools available to them in the medical certification process," he said, noting that FMLA provides employers with opportunities to properly approve FMLA status.

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Protecting Employees from Accidents, Illness When Traveling Outside United States



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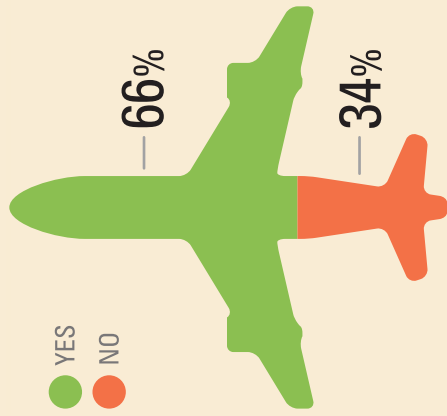


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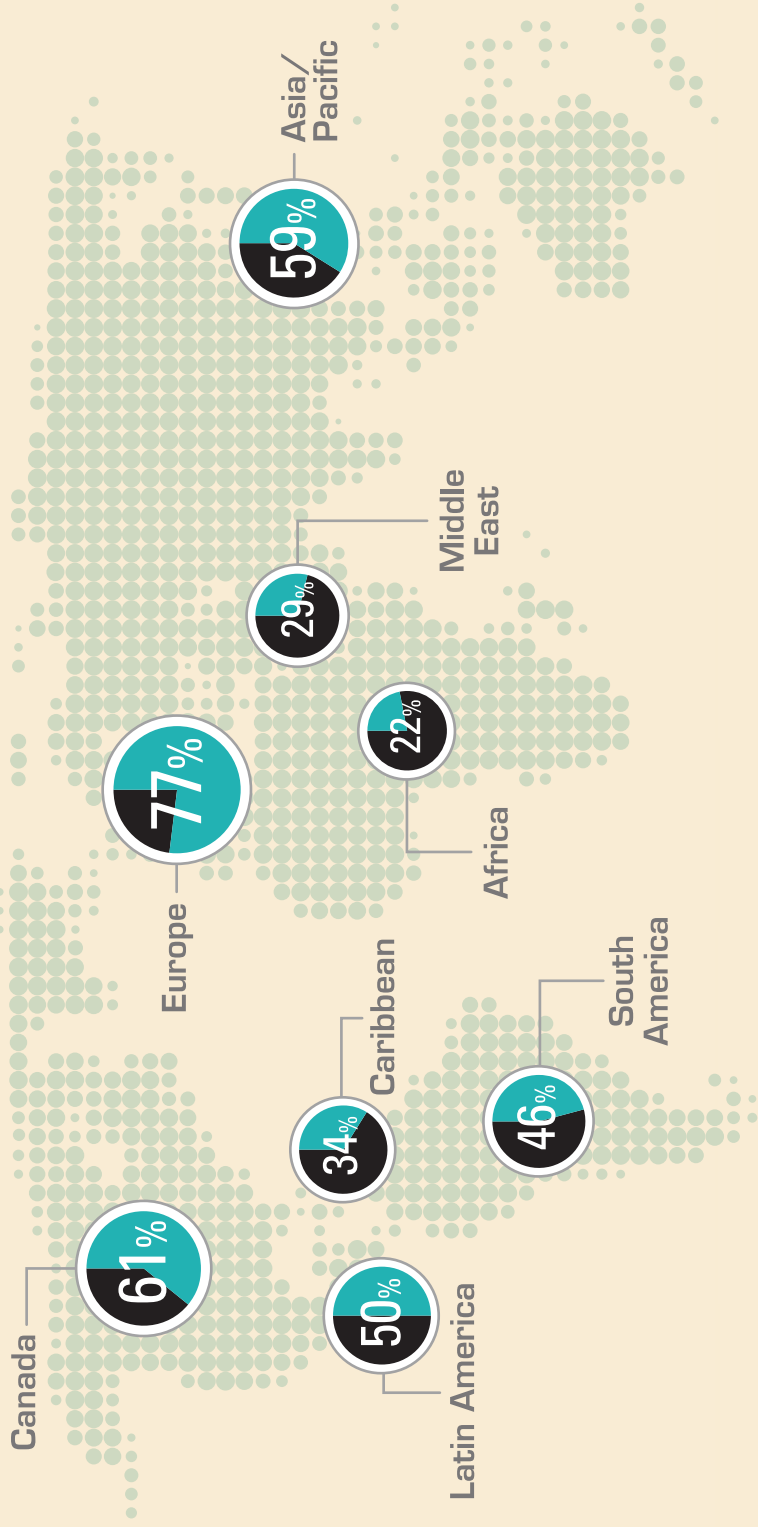
Globalization means more U.S. employees at risk of injury and illness while traveling on business to foreign countries

HOW MANY COMPANIES HAVE U.S.-BASED EMPLOYEES WHO TRAVEL TO FOREIGN COUNTRIES ON BUSINESS?

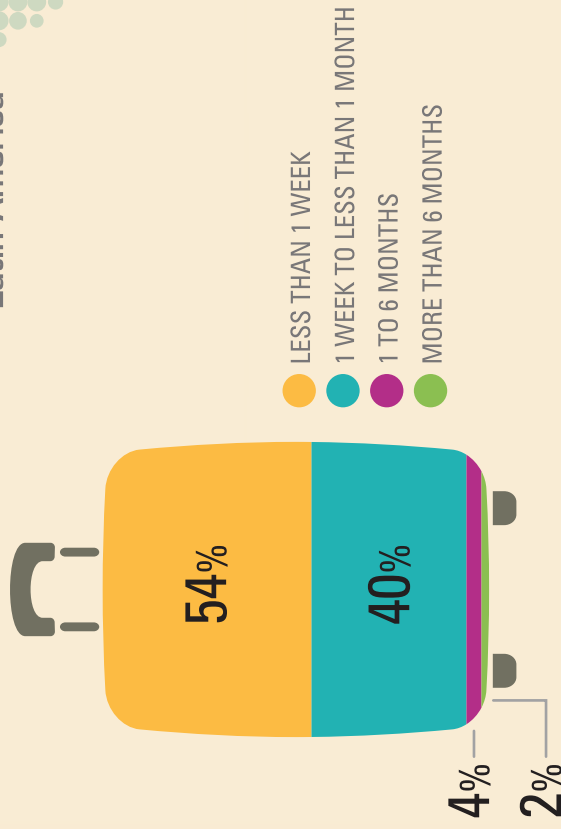


INTERNATIONAL TRAVEL ACTIVITY, DESTINATIONS

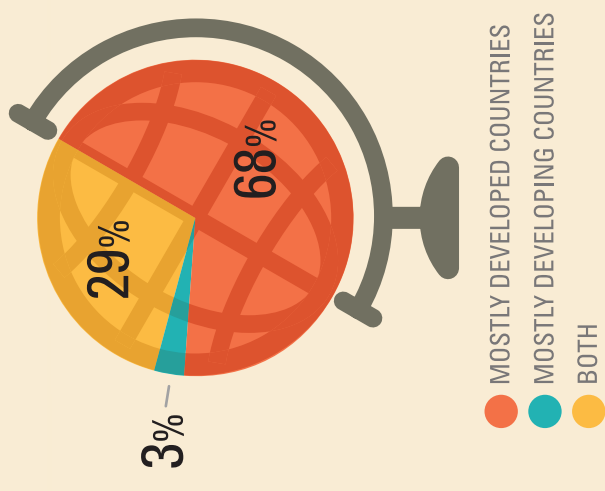
WHAT REGIONS OF THE WORLD HAVE YOUR EMPLOYEES VISITED ON BUSINESS TRIPS IN THE PAST 12 MONTHS?
(Multiple responses allowed.)



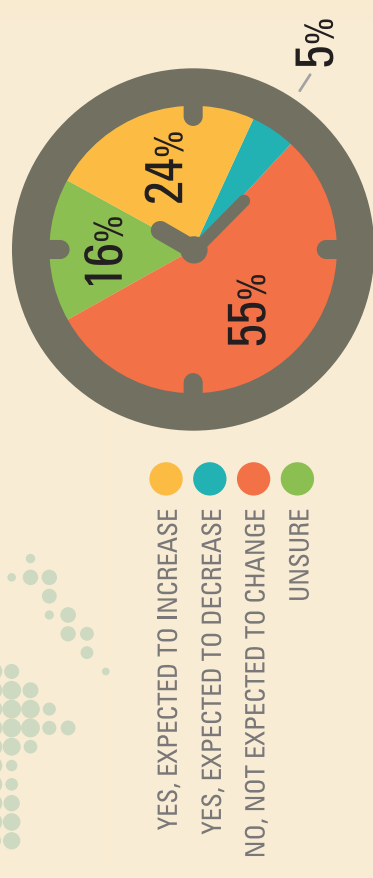
WHAT IS THE AVERAGE LENGTH OF STAY FOR EMPLOYEE TRAVEL TO FOREIGN COUNTRIES?



WHAT KIND OF COUNTRIES ARE EMPLOYEES VISITING ON BUSINESS?



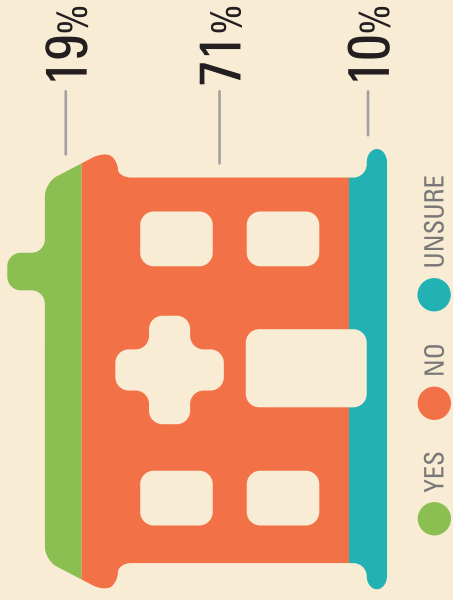
IS THE AMOUNT OF FOREIGN TRAVEL BY YOUR U.S. EMPLOYEES EXPECTED TO CHANGE IN THE NEXT 12 MONTHS?



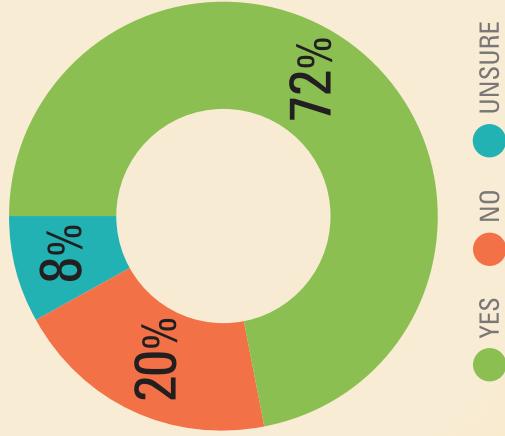
HOW MANY EMPLOYEES TRAVEL TO FOREIGN COUNTRIES ON BUSINESS IN A TYPICAL 12-MONTH PERIOD?
Mean = 249 employees



IN THE PAST 24 MONTHS, HAS ONE OR MORE OF YOUR EMPLOYEES REQUIRED HOSPITALIZATION WHILE TRAVELING OR WORKING ABROAD?

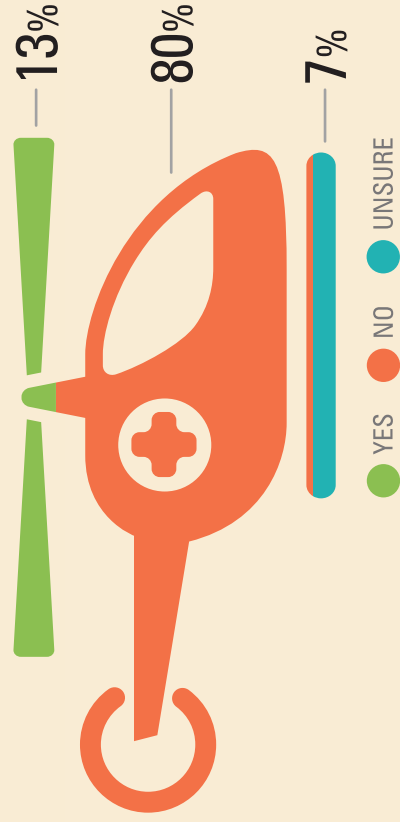


DO COMPANIES PROVIDE TRAVEL ACCIDENT COVERAGE FOR EMPLOYEES TRAVELING OR WORKING ABROAD?

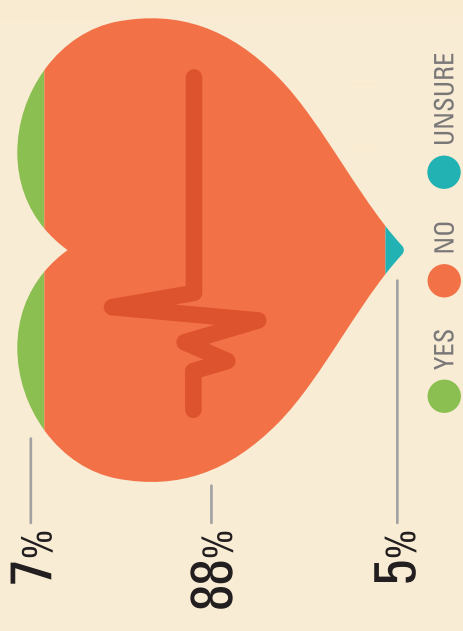


MEDICAL EMERGENCIES AMONG BUSINESS TRAVELERS

IN THE PAST 24 MONTHS, HAS ONE OR MORE OF YOUR EMPLOYEES REQUIRED A MEDICAL EVACUATION DUE TO ILLNESS OR INJURY?



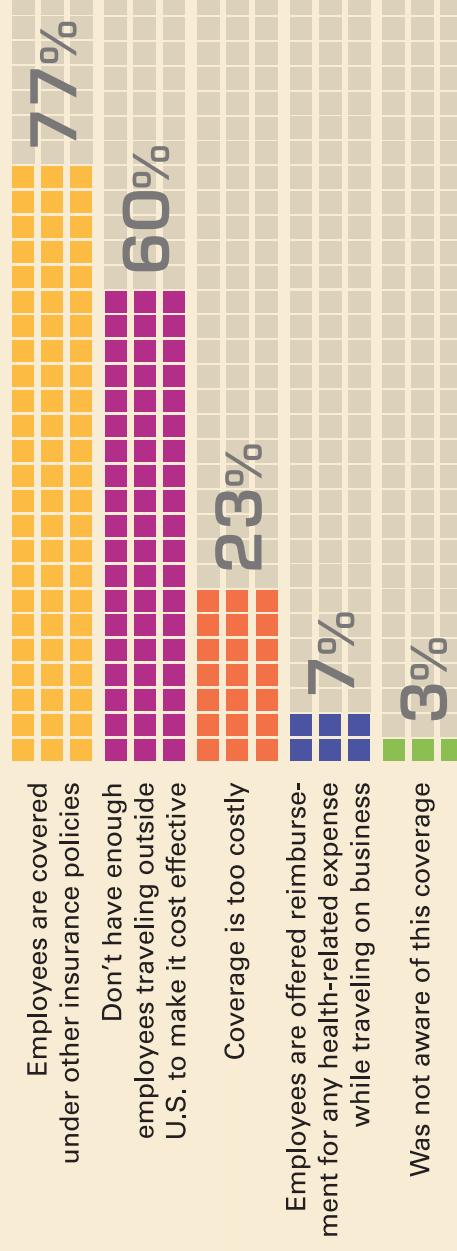
IN THE PAST 24 MONTHS, HAS ONE OR MORE OF YOUR EMPLOYEES DIED WHILE TRAVELING OR WORKING ABROAD?



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IF NOT PROVIDING TRAVEL ACCIDENT COVERAGE, WHY NOT?

(Multiple responses allowed.)



Source: All data in this poster was compiled from a survey conducted in October 2012 by Signet Research Inc. on behalf of Business Insurance. Signet's analysis was based on 152 respondents who actively manage/influence HR and/or employee benefit programs in their company and have U.S.-based employees who travel to foreign countries on business.

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FMLA: Employers have hard time complying

CONTINUED FROM PAGE 14

"Medical certification is perhaps the best tool for determining whether an absence truly is covered by the FMLA and it also helps combat abuse of FMLA," said Mr. Nowak, who represents employers. "It's critical that employers utilize that medical certification process as best they can."

Also, before potentially terminating an employee who has exhausted his or her FMLA leave, employers need to make sure they are not violating the Americans with Disabilities Act by not considering the reasonable accommodation process necessary under the ADA, said Chad Richter, Omaha, Neb.-based partner with Jackson Lewis L.L.P., who represents employers.

'It's critical that employers utilize that medical certification process as best they can.'

Jeff Nowak, Franczek Radelet P.C.

"I see some employers trip up on that scenario where the employee exhausts their FMLA entitlement and they don't consider whether they have any ADA obligations, meaning to continue to provide time off work as part of a reasonable accommodation and they simply terminate an employee without giving deference to the ADA," he said (see related story).

While good strategies to combat FMLA noncompliance include regularly updated communication materials for employees, FMLA training for front-line managers and educational meetings with employees regarding their FMLA rights, organizations also can centralize the process around FMLA under a single unit within the human resources department, Tower

Watson's Ms. Tavarozzi said.

"That function would include everything from determining employee eligibility to the application process, the tracking and all of the regulated communications that the government requires," she said.

Another avenue that more employers are pursuing is to establish a centralized process with an external provider that can administer the FMLA on behalf of the employer and deal directly with the employees, she said.

Health problem could qualify as disability

In *Arlene C. Moore v. Maryland Department of Public Safety and Correctional Services*, a Baltimore federal court suggests that once an employee exhausts protected leave time under the Family and Medical Leave Act, the employer is not simply free to terminate the employee.

The court in 2011 denied the Maryland Department of Safety's motion to dismiss the suit, saying the department may have violated the Americans with Disabilities Act of 1990 when it terminated Ms. Moore after she exhausted FMLA-protected leave for cancer treatments.

The case points out that an employee with a serious health condition may also qualify as a disability under the ADA, a consideration requiring "a case-by-case determination of whether the accommodation needed by an employee is reasonable under the circumstances," said Chad Richter, Omaha, Neb.-based partner with Jackson Lewis L.L.P.

The case is awaiting a ruling on an August motion for summary judgment filed by the state agency in U.S. District Court for the District of Maryland in Baltimore.

— By Mike Tsikoudakis

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Employers face accommodating obese workers

ADA shift could spur more bias claims filed with EEOC

By JUDY GREENWALD

Employers can expect to be more frequently accused of engaging in disability discrimination against obese employees and job applicants in litigation filed by the federal Equal Employment Opportunity Commission and private plaintiffs, experts say.

The lawsuits may not necessarily be about the obesity itself, but relate to conditions associated with being overweight, including diabetes and high blood pressure, which are considered disabilities under the Americans with Disabilities Amendments Act of 2008.

Obesity is generally recognized as a growing problem. According to the Centers for Disease Control, 35.7% of adults, or more than 72 million people, are considered obese, based on having a body mass index — which is determined by weight and height — of at least 30. A total of 6.3% of the population is morbidly obese, based on a BMI of at least 40.

“Certainly, anybody with morbid obesity would be considered a person with a disability under the more liberalized definitions of the ADA Amendments Act,” said Robin E. Shea, a partner with law firm Constangy, Brooks & Smith L.L.P. in Winston-Salem, N.C. “Also, anybody who is obese because of an underlying medical condition, whether or not their obesity itself is protected,” might

be considered disabled as well.

The issue has been the subject of increased scrutiny by the EEOC and the courts, experts say (see related story). The EEOC has filed more lawsuits against employers and “there’s been more activity on the individual plaintiff side as well,” said Nathan Pangrace, an associate with Roetzel & Andress L.L.C. in Cleveland.

Martha J. Zackin, of counsel at law firm Mintz, Levin, Cohn, Ferris, Glovsky & Popeo P.C. in Boston, said she expects more litigation on this issue. “Our population’s getting larger, and the (EEOC’s) definition of disability is getting broader,” she said.

“The law relating to this issue continues to evolve,” said Laura Sack, of counsel at law firm Veder Price P.C. in New York. The enactment of the ADA Amendments Act “may make some of these claims a little bit easier to bring, or more common.”

Mr. Pangrace said the act’s intent “was really to get employers to focus more on accommodating the disabilities, rather than questioning that the employee was disabled to start with. It’s really shifting a burden from the employee to prove that he or she is disabled to the employer to accommodate those disabilities.”

Some legal observers think the courts are moving toward defining obesity as a disability. Eric E. Kinder, a member of law firm Spilman, Thomas & Battle P.L.L.C. in Charleston, W.Va., said, “At this point, I don’t think they are a truly protected class unless you are looking at individuals who are severely or morbidly obese, but I can see a trend in the direction that they are becoming more of a



CASE HISTORY

There have been several lawsuits that have dealt with the issue of obesity as a disability:

- In its July ruling in *BNSF Railway Co. v. Eric Feit*, the Montana Supreme Court held that obesity can still be considered a disability in cases when it is not the symptom of a physiological condition, in a case in which the Fort Worth, Texas-based Burlington Northern Sante Fe Railway Co. allegedly discriminated against an applicant for a conductor trainee position because of his obesity.
- In July, a unit of Arlington, Va.-based BAE Systems Inc. agreed to pay a \$55,000 fine to settle a discrimination claim filed by the federal Equal Employment Opportunity Commission in a case involving a morbidly obese worker whose job was terminated.
- In April, the EEOC reached a \$125,000 settlement with the nonprofit organization, Philadelphia-based Resources for Human Development Inc., for terminating an obese employee, Lisa Harrison; Ms. Harrison died as a result of her morbid obesity before a settlement was reached.

protected class. It’s largely the EEOC’s interpretation of the ADA Amendments Act, and their enforcement of it, more than any litigation that I’ve seen.”

“I think we are moving towards obesity itself being defined as a disability,” said Margaret J. Grover, an attorney with Kronick, Moskovitz, Tiedemann & Girard in Walnut Creek, Calif. “I’m seeing things chip away at the edge of it,” she said. “We’ve seen a lot of press on obesity being an epidemic,” and that it shortens life expectancy, “so I think the courts will catch up with the medical information.”

Ms. Shea said, “I definitely think a court would be more likely nowadays to find that at least a person who qualifies as obese, as opposed to needing to

lose 25 pounds, would be protected” under the law, “either because of the obesity itself, or because of one of the associated medical conditions.”

“It’s kind of a gray area right now,” Mr. Pangrace said. Under the ADA, “essentially a disability now is any serious health condition that can substantially affect a major life activity,” which can include walking, dressing yourself or going to the bathroom, he said.

“Since the act has been amended, we’ve seen some courts being increasingly lenient with the definition of a disability, and expanding that to cases of people who are obese. Now, it can’t simply be somebody who’s overweight typically.” The cases involve “people who are extremely overweight to

the extent that it really affects their performing these daily tasks,” Mr. Pangrace said.

Kristine E. Kwong, a partner with law firm Musick, Peeler & Garrett L.L.P. in Los Angeles, said, “Medical conditions in general is a growing protected category, and there are more and more claims that are filed over disabilities, and because of that you’re going to see more and more of these issues arise.”

Ms. Zackin said, though, “It’s hard to quantify exactly at what point” obesity is considered a disability “because it’s a matter of case law and a matter of how the ADA amendments are interpreted, and how the definition of disability is interpreted.” But under the ADA Amendments Act, the definition of disability “has significantly broadened, and the EEOC certainly takes the position” that obesity is a protected disability.

“It’s starting to be litigated, and I think that over the course of time, there’ll be lines drawn as to where does the overweight and not disabled come in, and where does obesity become a disability. A part of it is not the weight per se, it’s the impact of that on the individual, whether somebody has diabetes, or has trouble walking a distance,” Ms. Zackin said.

Ms. Zackin said in one case she was involved in an employee needed a seatbelt extender for a forklift, so it became a safety issue. The issue also has arisen in hospitals, where an obese nurse could affect a patient’s safety. In that case, an accommodation would be to have somebody else do any job-related lifting.

“Right now, I would highly advise people to get their lawyer involved until we get a clearer picture and more courts have weighed in on this,” said Robert E. Gregg, a partner with law firm Boardman & Clark L.L.P. in Madison, Wis., adding he presumes more courts will rule that obesity, absent any other factor, is a disability.

“We’re going to have to get into the issue of what is obesity,” Mr. Gregg said. “It still requires an assessment, because does that mean 30 pounds overweight, 50, 100? We’re still going to have a lot of issues of getting a handle on this.”

To avoid disability claims, work with obese employees

Employers should do what they can to accommodate obese employees, legal experts say.

Laura Sack, of counsel at law firm Veder Price P.C. in New York, said, “The prudent employer, when faced with requests for accommodation by disabled individuals, should evaluate those requests on an individualized basis, as supposed to stating a blanket rule that, ‘Obesity is not a disability, therefore we’re not required to accommodate you.’

“Also, I think the prudent employer does not make a judgment call that

because someone is obese, they are not qualified to perform a particular job, absent actual facts that truly support that conclusion,” she said.

Margaret J. Grover, an attorney with Kronick, Moskovitz, Tiedemann & Girard in Walnut Creek, Calif., said, “You don’t have to provide every accommodation that an employee requests, but an employee might request time off to have some kind of medical intervention,” such as surgery, “and I would recommend that (employers) give them the extra time off if they are reasonably able

to do so,” although “you might want to work with them on scheduling, so it doesn’t come at your high season.”

Martha J. Zackin, of counsel at law firm Mintz, Levin, Cohn, Ferris, Glovsky & Popeo P.C. in Boston, said if an employer has a performance issue with an employee who is morbidly obese and the employee claims discrimination based on disability or obesity, “whatever issues might arise out of the obesity must be distinguished from the performance issues.”

Eric E. Kinder, a member of law firm Spilman, Thomas & Battle P.L.L.C. in

Charleston, W.Va., said, “My advice to employers right now would be not to dramatically or drastically change what they’re doing, but to make sure their (human resources) professionals are attuned to the fact that individuals who are obese or significantly overweight are getting more protection under the EEOC, just making sure that employment decisions are factually supported with documentation when they’re making employment decisions regarding those individuals.”

— By Judy Greenwald

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The problems employers face have been exacerbated by the economic downturn and resultant swath of layoffs, as former workers have sought compensation for what they believe to be illegal treatment by their organizations.

And the road ahead does not look any easier for employers as employees and their legal advisors allege new variants of alleged workplace discrimination.

To address these issues, risk managers must stay current on legal and regulatory developments and ensure that their organizations effectively communicate with all employees on workplace conduct issues. And when employment practices concerns arise, they should deal with them swiftly and equitably.

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What's driving this surge?

There are several emerging exposures.

- **Retaliation:** This is the cause of action with the greatest increase in frequency in recent years (according to EEOC statistics).
- **Disability Discrimination and Family and Medical Leave Act (FMLA) issues:** Recent amendments to the Americans with Disabilities Act (ADA) increase the number of people defined as individuals with a disability. Under the FMLA, military family leave provisions and the changes to the medical certification process are poorly understood issues among many employers.

- **Wage and Hour issues:** Exempt/non-exempt and independent contractor/employee misclassification, overtime, tips, and rest and meal periods have been the subjects of a growing number of investigations by the U.S. Department of Labor. Over 300 new Department of Labor investigators have been hired since 2010 with more to follow.
- **Social Media:** There is little regulation in this area. Failure of many employers to have social media policies or preparation for events/issues related to social media is leading to increased torts exposure (for example, defamation or invasion of privacy).

It's becoming increasingly obvious that employment practice lawsuits are going to continue to proliferate. It's also clear that liability lines are blurring, and the need to address various possible scenarios requires a deep understanding – on a case-by-case basis – of a business' potential exposures. Brokers should look to work with carriers whose products are robust, and whose commitment to hiring top-tier, experienced professionals ensures that complex issues are looked at and understood from every possible point of view.

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BI webinar examines public-private projects

Surety bonds sector adjusts to keep pace with contract changes

Public-private partnerships have become a more common practice in the construction industry, but that doesn't mean they have become any less complicated.

In a *Business Insurance* webinar sponsored by Zurich Insurance Group Ltd., three experts discussed what these "P3s" mean for the construction and insurance



WEBINAR: To view the *Business Insurance* webinar "How is the Surety Market Responding to Unique Risks of P3 Projects?" go online to businessinsurance.com/webcasts.

industries. The webinar can be viewed at no cost on demand at businessinsurance.com/webcasts.

The speakers included Lynn Schubert, president of the Surety & Fidelity Association of America, and Larry Bartelemucci, chair of the real estate and construction practice group at Anderson Kill & Olick P.C.

Drew Brach, managing director and U.S. surety practice leader at Marsh Inc., was the first presenter for the live webcast last week. He focused on the mechanics of bonds by showing an example, walking the audience through how a public-private partnership takes shape on a construction project, and ending on how underwriting and pricing is decided for these projects.

"Simply put, it's a complicated transaction," Mr. Brach said.

Mr. Brach has been in the construction surety business for 34 years. What used to be a basic construction contract has changed to something closer to legal documentation.

"It's a long and detailed process," Mr. Brach added.

He also advised attendees to be ready for more complex construction projects in the future. In 2005, there were zero construction projects in the United States costing more than \$1 billion. In 2011, there were more than 100.

Ms. Schubert went on to discuss the legal and financial risks involved with public-private projects. She noted how surety companies have changed to keep up with changes in the construction industry, finding that some organizations have embraced coverage for design-build projects, while others still refuse to.

The final speaker was Mr. Bartelemucci, who has experience prosecuting owner's claims under payment and performance surety bonds. He focused mainly on the difference between the two types of bonds, such as which groups are covered and what risks each bond covers.

After the presentation, Matt Dunning, associate editor at *Business Insurance*, moderated a question-and-answer session.

Topics ranged from the future of public-private partnerships in regards to smaller government projects to context of the phrase "value for money" in such conversations.

— By Anna Gaynor

UP COMINGS & GOINGS
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Sandy: Up to \$20B in Sandy losses

CONTINUED FROM PAGE 1

challenge and that claims for business interruption would amplify physical damage losses.

"It will take at least a few weeks before we are able to estimate Sandy's full impact due to the magnitude of the event," he said.

Claire Souch, vice president of model solutions at Newark, Calif.-based catastrophe modeler Risk Management Solutions Inc., said uncertainties surrounding the storm, such as the rate at which power is restored, made a reliable estimate of the total insured losses premature.

"In particular, the speed of restoration of power, and pumping out of floodwaters from towns and transport systems remain major unknowns," Ms. Souch said in a statement. "Our experience shows that these key variables will play a significant part in the ultimate loss."

Peter A. Gilbertson, New York-based senior vice president and regional managing director at Wells Fargo Insurance Services Inc., agreed.

"The early estimates are in the range between Hurricane Irene and Hurricane Katrina, but we are not going to have any precision or predictive quality for a long time," he said. "Suffice it to say insured losses are going to be massive."

Finley Harckham, a New York-based shareholder at law firm Anderson Kill & Olick P.C., said

apportioning the role of water vs. wind in damages would delay a final determination of losses, as would the complex interrelation of causes that may spur a company to file a contingent business interruption claim.

"The fact that Lower Manhattan was without power creates all types of CBI issues," Mr. Harckham said. "There are going to be a lot of causation issues as companies look to see which of the time element coverages they might be able to tap into."

Mr. Gilbertson agreed.

"The lesson is we may have to rethink some of the assumptions about business continuity," he said. "That's not just in the insurance community, but in all businesses."

Dan Dick, Dallas-based global head of catastrophe management at reinsurance intermediary Aon Benfield, said he expects insurers to tighten underwriting practices as a result of Sandy, especially concerning water damage and business interruption.

"Sandy is going to force some of the same sublimits and exclusions on the primary insurance side that we saw for policies on the Gulf Coast after Hurricane Katrina," Mr. Dick said.

Brad Adderley, partner and member of the insurance team at Hamilton, Bermuda-based financial services advisory firm Appleby Global Group Services Ltd., said the storm may alter rates in the Sandy-affected areas.

"I wouldn't surprise me if we saw the market turning harder and Northeast insurance rates going up," he said.

Reinsurers may seek higher rates for insurers with Northeast exposures during the upcoming Jan. 1 renewals. "It's an interesting time

Industry will weather storm, but with challenges

By BILL KENEALY

The insurance industry likely will weather the financial ramifications of Superstorm Sandy in the long term, but analysts say there will be short-term challenges.

"The storm will not be a capital issue for most insurers," Adam Klauber, Chicago-based analyst for William Blair & Co. L.L.C., said in a statement. "In the toughest scenario, the loss for insurers in our coverage universe will likely be limited to between one half to a full quarter worth of earnings."

While Sandy-related losses are not likely to result in systemic price increases, Mr. Klauber said they could well affect insurance and reinsurance prices in the Northeast.

"This is the second large event in two years," he said in referring to 2011's Hurricane Irene. That will "make it less attractive to write homeowners or commercial property in these areas. As a result, we

expect prices for many property-related coverages in affected areas to be up in 2013."

Likewise, Dan Farrell, New York-based senior research analyst at Sterne Agee Group Inc., said Sandy may cause incremental pricing increases.

"In lines such as homeowners and commercial property insurance, where pricing has been increasing in the mid- to high single-digit range, the current momentum could continue longer than it would have previously," Mr. Farrell said in a statement. "Additionally, to the extent that losses do flow into the reinsurance lines, property cat reinsurance rates, which in our view would likely have declined at Jan. 1, may decline at a slower pace."

In a research note, New York-based Moody's Investor Service Inc. said that while Sandy dashed the property/casualty industry's hope for a quiet end to the year and will negatively affect earnings in the coming financial quarters, the industry

has sufficient capital strength to absorb the losses.

"The P&C industry as a whole is currently at a level of relative capital strength, with good risk-adjusted capitalization, moderate financial leverage, and earnings that have benefited from price increases and relatively low weather-related losses through the first three quarters of the year," Moody's said. "In addition, the event will likely help support price increases going into 2013."

Likewise, New York-based Standard & Poor's Ratings Services said in a statement that it expects Sandy to have a limited impact on the long-term ratings of U.S. property/casualty insurers, but said the losses were indeed material.

"It is widely expected that Hurricane Sandy will inflict more severe losses than Hurricane Irene, which struck the U.S. East Coast in August 2011, and cost the industry \$4 billion and \$5 billion," S&P said in a statement.

for negotiations with underwriters, whether or not the storm directly affected you," Mr. Adderley said.

Conversely, Aon's Mr. Dick said he didn't see the storm "moving the dial" much on reinsurance rates, because insurers likely would bear the bulk of the losses. "I think we are going to see this being a loss that retained well within the insurance industry," he said. "I don't see this being a big reinsurance event."

Nonetheless, he said the storm reinforces for individuals and the insurance industry the damage that can be caused by storm surge.

Tim Doggett, Boston-based principal scientist at AIR, said the storm conformed to what the models had projected.

"Sandy was not an aberration," Mr. Doggett said. "We've seen strong storms come into the Northeast before and expect — in terms of long-term climatology — storms

to continue to hit this area."

Andrew Logan, director of the insurance program at Ceres, a Boston-based nonprofit focused on sustainable development, said insured losses from Sandy should be viewed in the broader context of the overall long-term risk profile for the United States, noting that Sandy arrived during the same year as of one of the most damaging droughts of the past century and catastrophic wild fires.

Losses: Business interruption claims

CONTINUED FROM PAGE 1

attacks were about one-third of the \$40 billion in insured losses, he said.

"I wouldn't be surprised if it was something similar, about one-third of losses, in this case," Mr. Schneider said.

While loss estimates were incomplete last week, John Dempsey, managing partner of Wilton, Conn.-based Dempsey Partners L.L.C., estimated Sandy's business interruption losses at about 30% of total insured losses.

"Overall, if it's a \$50 billion event, it may be, say, \$15 billion to \$20 billion in" business interruption, he said.

Sandy's devastation disrupted business operations in the densely populated Northeast and affected industries including retail, corporate offices, transportation, manufacturing and energy concerns (see story, page 27), experts said.

Given the storm's wide geographic impact and lengthy service disruptions, such as power, phone and subway closures in New York, business interruption claims will be a significant issue,

said Howard Mills, chief adviser at Deloitte L.L.P.'s insurance industry group in New York and former superintendent of the New York State Insurance Department.

"I think that there will be significant business interruption claims and there will be a lot of valid claims as a result of the mandated evacuations and orders," Mr. Mills said.

Business interruption policies typically cover mandated evacuations, known as civil authority orders, which often involve loss of ingress or egress coverage, or access, to an insured property, experts say.

As was the case during Sandy, many municipalities ordered businesses along the Northeast and Mid-Atlantic to close or evacuate, shut down roads and restricted access to public transportation.

Ingress/egress and civil authority clauses within a business interruption policy may cause complications for policyholders, Mr. Dempsey said.

"Those remain the issues from a measurement and recovery standpoint because those coverage parts have different terms and condi-

tions," he said.

For example, most policy clauses have a time limitation for ingress/egress and civil authority coverage. Thirty-day limitations are common. Beyond that 30 days, "you're on your own," Mr. Dempsey said.

When exactly civil authority is triggered in a business interruption policy has not been entirely answered in the courts, said Marc E. Rosenthal, a partner at Proskauer Rose L.L.P. in Chicago, who represents policyholders and captive insurance companies.

"Hurricane Sandy brings business interruption coverage issues to the forefront that have not been fully dealt with before," Mr. Rosenthal said. He said whether business interruption coverage responds to a loss of profit under civil authority or preservation-of-property clauses when a business shuts down before a storm hits remains to be seen.

Linda D. Kornfeld, a partner at Jenner & Block L.L.P. in Los Angeles who represents policyholders, advises buyers to carefully examine their business interruption policy language to best position

coverage claims.

"There have been clear access issues in the Manhattan area to say the least, and certainly in other areas as well," Ms. Kornfeld said, noting that whether property damage is needed for civil authority coverage to trigger may become a major legal question.

"In that instance, the (New York subway) tunnels have been flooded, there has been damage to property that ultimately has caused the order of civil authority and the inability for these businesses to run that are sitting in Manhattan," Ms. Kornfeld said.

"Depending upon the policy language at issue, ingress/egress coverage may provide coverage opportunities in circumstances where the civil authority coverage does not apply because of geographic limitations in the coverage, which again makes the critical point — read the policy language and applicable law carefully, and frame your coverage claim in a manner that best advances your coverage position," she said.

Tom Teixeira, London-based senior risk adviser at Willis Group Holdings P.L.C., said the potential size of business interruption losses may indicate a disconnect between risk management and

business continuity strategies, as well as a slow takeup rate.

"I'm not seeing a lot of evidence that the lessons learned from the disasters last year are being taken onboard," he said.

While traditional nonproperty damage business interruption coverage costs were expensive when first introduced into the market, between 5% to 8% rate on line, "we're now seeing rates fall down to between 1.5% to 3.5%" rate on line, Mr. Teixeira said, with limits between \$50 million and \$100 million.

"When we start getting a better understanding of the business interruption numbers from the disaster on the East Coast, it's going to be a catalyst around getting this particular market to move and getting people to buy this type of protection," he said.

As many goods and products are manufactured and transported through New York and other nearby cities, contingent business interruption claims related to Hurricane Sandy also may be significant and fairly complicated, especially as coverage is predicated on causation, experts say.

"There will be a question of what was the cause of the loss, was it wind or flood?" Mr. Dempsey said.

Marine, energy sectors still evaluating insured losses from Sandy

By JUDY GREENWALD

Superstorm Sandy caused significant marine- and energy-related losses that included a huge transformer explosion in Manhattan and the grounding of a tanker on Staten Island.

However, "It is still very early in the damage assessment process to have a clear picture of impact on the marine and energy insurance markets," Bobby E. Bierley, Houston-based vice president and account executive with Lockton Marine & Energy, said in an email. For energy, "We do not view this as a market-changing event at this time. Marine will require a bit more time for assessment," he said.

During its peak, more than 8 million U.S. customers reportedly were without electricity along the Eastern Seaboard. The Nuclear Regulatory Commission said Friday that all nuclear power units shut down as a result of the storm have been restarted.

Bertil Olsson, Houston-based North American energy, mining and power practice leader for Marsh Inc., said damage to the oil and gas sector is restricted mainly to terminals and storage facilities.

"We're not aware of any refineries that sustained any major damage," Mr. Olsson said. However, there is widespread utility damage "so we do believe there's going to be an impact there on the market."

Carlos Carrillo, Houston-based regional head of energy for Allianz Global Corporate & Specialty, a unit of Allianz S.E., said that because of the oil, gas and petrochemical operations and heavy machinery and equipment that Allianz insures, damage "most likely is going to be from flooding" and water rather than from high winds.

The key to business interruption losses due to the power outages depends on how fast clients can do "the repairs necessary to bring the facilities back up," he said.

"There's going to be quite a lot of insured losses right there in the energy sector," said Gary Thompson, a partner and insurance recovery attorney with Reed Smith L.L.P. in Washington. "New Jersey is a major hub for oil refining and gasoline distribution," and "there is physical damage from the storm surge and wind, but also probably

much larger business interruption losses that will be insured somewhere upstream."

Mr. Carrillo said, however, that the "energy industry is well prepared to weather this kind of event, because they do have a well-established risk management program" in the event of a hurricane, in which they usually shut down facilities close to the coast before such a storm strikes.

Discussing losses in the marine sector, "We couldn't even hazard a guess at this point in time, certainly, given the extent of this storm," said Kevin Wolfe, New York-based head of the marine

northeast region and global head of Project Cargo for Allianz. "I'm fully expecting high activity with respect to claims."

"This storm caused substantial disruption in shipping plans," Mr. Thompson said. Like flight disruptions, shipping schedules that get disrupted have "a ripple effect that goes around the globe, so the negative financial impact on the marine side will be substantial, well beyond the immediate physical damage."

"There's massive damage to the ports in Elizabeth (N.J.), and up down the New Jersey and New York coastlines," he said.

Ships also head out to sea during hurricanes to avoid damage, industry observers said.

Alan Rubin, a government relationships specialist with law firm Cozen O'Connor in New York, said that while marine losses are expected to be substantial, moving ships out to sea can help reduce losses.

"If a ship is moored next to shore, and they get hit" by a big wave, "it's got nowhere to go, it can tilt over," he said. "You're better off taking your chances by running out to sea and see if you can outrun it."

In the aftermath of the hurri-

cane, a news report showed footage of a nearly 170-foot water tanker that ran aground in Staten Island, N.Y., on Monday night. There was also reports of a transformer explosion at a Consolidated Edison Inc. plant on 14th Street in Manhattan.

Guy Claveloux, New York-based managing director at Marsh, said there has been "an abundance of (insurance) capacity in the marine sector," with rates that were still trending downward.

"It's hard to say right now what's going to happen to rating in a market that is still quite soft," Mr. Claveloux said.

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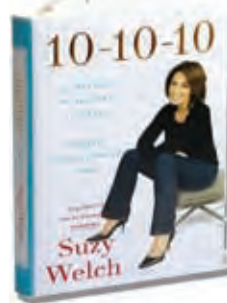
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Beazley	5
Business Insurance	27, 29, 31
Crystal & Company	9
Florida State University	24
Liberty Mutual	32
The Navigators Group	25
OneBeacon Professional Insurance	22/23
Riskconnect	19
Swiss Re	14
XL Insurance	10
Zurich North America	7, 18

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Medicare: Firm speeds set-aside process

CONTINUED FROM PAGE 3

contractor is doing a great job in terms of getting them back to us with a reasonable explanation of any changes," Ms. Wiswell said.

The set-aside approval process is optional, but recommended for payers that want assurance that they've included enough money to pay for a claimant's projected future medical expenses. Insurers and employers that don't adequately cover such costs could be liable to pay a claimant's future medical bills if the settlement money runs out.

Some insurers and employers have opted to skip the approval process to avoid delays that were seen under Lifecare Management, sources say.

Lifecare could not be reached for comment.

Previous delays led some workers comp settlements to fall apart, since claimants typically are unable to receive settlement funds while waiting for approval of their Medicare set-asides, Mr. Anders said.

"A lot of times, (claimants are) relying upon these funds — not only the MSA funds, but the larger settlement that is pending the

outcome of this determination by CMS — and it's had a harmful impact on them waiting that long," Mr. Anders said.

Stalled set-aside agreements also have resulted in higher comp costs for insurers and employers in the past, said Martin Cassavoy, vice president of strategic services for North Reading, Mass.-based Crowe Paradis Services Corp., a Medicare Secondary Payer compliance company.

"Every week that goes by extra for you to settle that case, you have to pay another week's worth of indemnity benefits, and that does add up," Mr. Cassavoy said.

With Provider Resources better able to handle the caseload, it's more likely that payers will choose to seek Medicare approval for comp settlements, said Michelle Allan, an attorney in the Medicare compliance group at law firm Burns White L.L.C. in Pittsburgh.

"The new contractor has been moving cases along very expeditiously," she said. "As long as they continue to do so, the risks that have been inherent in the process really aren't quite as pronounced."

Still, there have been some challenges in working with the new

contractor on set-aside reviews. Mr. Anders said there have been variations in how much money the company asks payers to set aside for medications or surgeries.

Provider Resources could not be reached for comment.

MedAllocators' clients have been asked in recent submissions to set aside \$45,000 for spinal fusion surgeries recommended for Medicare beneficiaries, Mr. Anders said. Set-asides approved by Lifecare typically were \$18,500.

The variation is "frustrating our ability to reasonably project what CMS will approve" for set-aside accounts, Mr. Anders said. However, he noted that Provider Resources has been open to reviewing its set-aside determinations.

As far as delays, a problem remains for cases submitted last year. Ms. Wiswell estimates that CMS had a backlog of 8,000 to 10,000 review requests in June.

In a September memo, CMS said that Provider Resources is working to reduce the backlog. "We are confident that submitters, Medicare beneficiaries and other program stakeholders will soon begin to see an increase in CMS' communications regarding

WCMSA proposals dated prior to July 2, 2012, and after," it said.

Ms. Allan said Burns White has several hundred set-aside submissions in that backlog, from November 2011. About 50 of the old cases have received reviews from Provider Resources, she said.

While it has been beneficial to have such cases move forward, Ms. Allan said it also presents challenges when Provider Resources needs additional information before approving a set-aside.

"People might need to expect to have to dig up additional information, even on cases that have been sitting over there a year or longer," Ms. Allan said.

She also said that prices for a claimant's prescription drugs could change significantly if their set-aside agreements wait several months or a year for approval. That could result in CMS asking insurers and employers to pay higher prescription costs once backlogged set-aside agreements receive approval.

Despite the challenges, Medicare experts say they're optimistic that Provider Resources will be able to keep up the current pace of set-aside approvals and keep comp settlements on track.

"I think that they're probably going to be able to handle it on an extended basis," Ms. Wiswell said.

Breach: Dangers on the rise

CONTINUED FROM PAGE 1

The South Carolina Department of Revenue contracted with information security company Mandiant Corp. to assist in the investigation of the breach, help secure the system, install new equipment and software, and tighten controls on access to the system.

In addition, the state began an outreach campaign to South Carolina taxpayers and offered affected individuals one year's free enrollment in Experian Information Solutions Inc.'s ProtectMyID program, which includes credit monitoring and identity theft insurance and lifetime ID theft resolution.

South Carolina Gov. Nikki Haley also announced the state had contracted with Dun & Bradstreet Credibility Corp. to provide South Carolina businesses that have filed a tax return since 1998 alerts to any changes taking place in their business credit files. Experian also is offering affected businesses monitoring services.

"The state is working hard both to provide appropriate services to citizens and taxpayers in the most cost-effective way possible in response to the incident, and to provide information about how we can best protect ourselves from the fraud and ID theft that will remain an ever-present threat in the information economy," said Jon A. Neiditz, a

partner at Nelson Mullins Riley & Scarborough L.L.P. in Atlanta, who is serving as counsel to the state on the data breach.

Mr. Neiditz called the state's outreach campaign "an unprecedented level of communication about data breach risks," and called the governor's negotiation of fixed fees with the credit monitoring services "truly unprecedented."

David Navetta, founding partner of Information Law Group L.L.P. in Denver, said he thinks hackers may see public entities as a "treasure trove," as their databases possess large volumes of information such as Social Security numbers and are seen as having weaker data security than most corporations.

Implementing data security measures such as encryption has been "hit or miss" in the public and private sectors, Mr. Navetta said, and tight budgets in a difficult economy have likely hampered public entities further in taking necessary data protection steps. "I do question on some level whether public entities are keeping up with the times in terms of security," he said.

"It's probably a similar story across all industries — there are some that are farther along than others" in terms of implementing information security measures, said Mr. Whetstone. "But, as a class, my view is (public entities are) probably not as well-funded or not as well-resourced."

Public entities might be further challenged by operating on older, less secure legacy systems, Mr. Whetstone said, or by operating on a variety of disparate information technology systems, similar "to what you have in an educational environment, when

a large university might have a different system running in different departments."

Betty P. Coulter, director of risk management and insurance at the University of North Carolina-Charlotte and president-elect of the Public Risk Management Association, said she believes public entities are making efforts to secure their data.

"I think public entities are making strides in protecting their data," Ms. Coulter said, noting that UNCC follows several guidelines and governance standards on data security. In addition to services available from private-sector firms, organizations like PRIMA or the University Risk Management and Insurance Association are seeking to train members on information security issues and provide forums for them to share information on the subject, she said.

South Carolina may well face lawsuits from individuals affected by the breach, though their chances for success may be limited, experts said.

"I could see that there would be lawsuits against the state, and it will be up to the affected people to prove damages, which will not be easy," said Mr. Bortnick. "You've got to prove actual harm."

"In most cases, unless there's some kind of identity theft that occurs, plaintiffs have not been very successful in litigating these cases in either the private or public sector," said Mr. Navetta.

Sovereign immunity protections might also be a factor, he said. "That may also be another defense for entities that suffered a data breach," Mr. Navetta said. "That hasn't been fully tested, at least in a data breach context."

ERM: Plan adds value

CONTINUED FROM PAGE 4

essential to secure top-level support for the ERM effort and make sure the process of developing the program was cross-functional and strategy driven, Ms. Peter said.

At St. Paul, Minn.-based Affinity Plus Federal Credit Union, "The culture ... is very strongly based on our key stakeholder and the key stakeholder is the customer," said David Seibert, Affinity Plus' risk management officer. At Affinity Plus, decision-making is kept close to the members, and the majority of the company's employees are empowered to make many decisions.

In that arrangement, Affinity Plus relies on few preventive controls and more on "detective" controls. The ERM program created had to embrace that detective control environment and the company's decentralization, while analyzing how much risk they create, Mr. Seibert said.

Restaurant chain Buffalo Wild Wings Inc.'s culture is marked largely by its rapid growth, so an ERM program imposing too much structure would never work, said Daniel Quandt, the company's Minneapolis-based director of internal audit.

Instead, the program focuses on goals and successes, and on getting people talking about risks rather than producing reports, he said. "We very much, as part of ERM, try to talk about our strategies and our initiatives and anything that stands in the way of our strategic initiatives is a risk."

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PCI: Economy, regulations could hamper industry

CONTINUED FROM PAGE 4

“problematic and acute,” he said, and the “threat of more costly regulations” looms as an issue for the property/casualty insurance industry.

The same theme was echoed by other speakers at the conference.

A former top federal economic official is “cautiously optimistic” about the United States’ long-term economic outlook.

Some pessimists say that the nation will never get through its current economic problems, said Michael J. Boskin, who served as chairman of the President’s Council of Economic Advisers under former President George H.W. Bush and is now a senior fellow at the Hoover Institution and a professor of economics at Stanford University.

He agreed that “we have serious, serious problems.” But he said the country has faced supposedly “insurmountable problems” in the past, such as the fear of Japanese economic competition in the 1980s, but has overcome them.

He said the United States has advantages over Europe, including

lower taxes, a less bloated welfare state, and global leadership in technology and productivity. “We have an opportunity in the next few years to right this ship,” he said.

But while previous sharp recessions in the U.S. have been followed by impressive recoveries, the current downturn has been followed by an “anemic” recovery, he said. Additionally, Mr. Boskin said he believes there has been “way too much government involvement in the economy” and added that there will be “lots of disruptions” while returning to a normal economy.

Still, “while we have some serious challenges to get through, I believe we will get through them,” he said. Noting the potential impact of Superstorm Sandy on the country, Mr. Boskin also praised the insurance industry “for all you do for the economy.”

Another veteran political observer said he believes next year will be a crucial one for public policy.

“A lot of public policy will be made in 2013,” said William Kristol, editor of *The Weekly Standard* magazine. For example, if Republican nominee Mitt Romney is

974 ATTEND ANNUAL PCI CONFERENCE

DANA POINT, Calif. – Despite Sandy’s disruption of air travel, the 2012 Property Casualty Insurers Association of America’s conference in Dana Point, Calif., last week drew 974 attendees.

During the conference, which used as its theme “Risk and Resilience: What Lies Ahead for the Nation and the Property Casualty Industry,” the PCI group chose new officers and heard a variety of speakers, including former White House official Michael J. Boskin, National Journal congressional correspondent Major Garrett and *Weekly Standard* editor William Kristol, discuss the importance of this week’s national elections. Additional discussions focused on regulatory issues and other matters.

Next year’s event will be in Boston Oct. 20-23, 2013. For more information, go to www.pciaa.net.
– By Mark A. Hofmann

elected, he has said he would repeal and replace the controversial Patient Protection and Affordable Care Act. If elected president, Mr. Romney also would be likely to seek changes in the Dodd-Frank Wall Street Reform and Consumer

Protection Act. The new president also would have to deal with the federal budget. And as if that were not enough, Mr. Kristol added that he thinks 2013 will be a critical year for dealing with Iran.

If re-elected, President Barack Obama also would have to make critical decisions dealing with spending, the national debt, the budget and foreign policy, said Mr. Kristol. “Either way, 2013 becomes a huge year.”

PCI had an election of its own during the meeting, choosing its officers for the next year.

Jonathan E. Michael, chairman and CEO of Peoria, Ill.-based RLI Corp., was elected as PCI’s chairman. In addition, Robert P. Restrepo, president, chairman and CEO of Columbus, Ohio-based State Auto Insurance Cos., was elected first vice chairman; and Terrence W. Cavanaugh, president and CEO of Erie, Pa.-based Erie Insurance Group, was elected second vice chairman.

“Their leadership will be invaluable to our advocacy efforts as we address soaring no-fault auto insurance costs, coastal and natural catastrophe reforms, federal corporate tax reform initiatives, regulatory modernization, reauthorization of the Terrorism Risk Insurance Act and workers compensation issues,” said PCI President and CEO David A. Sampson in a statement.

inBrief

CONTINUED FROM PAGE 1

Gen Re executive killed during Sandy

A Stamford, Conn.-based General Reinsurance Corp. vice president, who was a volunteer firefighter, was among Superstorm Sandy’s victims last week. Russell R. Neary, 55, had been employed since 1979 at Gen Re, where he was a vice president in the reinsurer’s global ocean marine unit, according to his obituary in the *Connecticut Post*.

Work comp premiums to grow by 9%

U.S. workers compensation premium volume for 2012 is on track to exceed 2011 growth by 9%, marking the second year of the line’s expansion, NCCI Holdings Inc. reported. Total premiums written are expected to reach \$35.2 billion.

Pension plan funding dips in many countries

The funded status of employer-sponsored pension plans in the United States and Canada has dipped during the first nine months of 2012, while funding of plans in the United Kingdom rose slightly and those in the Netherlands plunged, according to Mercer L.L.C. In the United States, plans sponsored by employers in the S&P 1500 were on average 73% funded as of Sept. 30, down from 75% as of Dec. 31, 2011, while funding for plans sponsored by Canadian employers in the S&P/TSX fell to 83% from 87%.

Domestic violence bias gets EEOC guidelines

The Equal Employment Opportunity Commission released guidelines for employers on the application of employment discrimination laws in situations of domestic violence and stalking, showing where an employer’s actions may violate Title VII of the Civil Rights Act and the Americans with Disabilities Act.

Textron: Nurses’ reviews help control claims costs

CONTINUED FROM PAGE 4

TPA Broadspire Services Inc. agreed to create such a program despite several unknowns.

“Basically they built the system, and one of the issues was figuring out how to price it,” Mr. Shaughnessy said. “That was one of the roadblocks the other TPAs that bid on our business had a problem with: figuring out how to get the pricing of nurses in their claims fee and (keep the cost) reasonable.”

Now, nurses decide what actions to take on a claim, managing each case to conclusion. But an adjuster also must work each case due to state mandates, Mr. Shaughnessy said. So adjusters handle nonmedical issues, such as approving or denying a claim.

Textron’s arrangement has had a “huge impact on bringing people back to work faster and cases closing faster” because the nurses’

expertise helps in medical discussions with treating physicians and nurses are a trusted medical resource for employees, Mr. Shaughnessy said.

The company’s workers comp medical costs decreased 14% a year per claim from 2005 to 2008, although they spiked after that due to layoffs. Since 2011, they have resumed a downward trend of about 12% a year, Mr. Shaughnessy added.

Under a more typical workers comp arrangement, employers pay an additional charge each time an adjuster calls in a nurse, said Gary Anderberg, practice leader for analytics and outcomes at Broadspire.

While it is still uncommon today for nurses to manage a workers comp claim from the outset, more large employers are discussing the strategy, Mr. Anderberg said.

Based on Textron’s workers comp success, MetLife Inc., the employer’s short- and long-term disability insurer and provider of family medical leave services, decided about two years ago that the claims it handles for Textron also could be better managed by nurses instead of adjusters.

Since disability plans are not state regulated like workers comp, Textron is free to use only nurses to manage its nonoccupational disability cases.

“So we have the nurses do everything,” Mr. Shaughnessy said. “They make approvals, denials and they manage the cases to conclusion, taking it a step further than we have on the workers comp side.”

Having nurses coordinate non-occupational disability claims also has improved outcomes, Mr. Shaughnessy said.

In addition, more than a year ago, Textron integrated the services provided by the workers comp and nonoccupational disability nurses with offerings from UnitedHealthcare, the employer’s group health insurer that “also

has a group of nurses dedicated to our employees,” Mr. Shaughnessy said.

Textron arranged for information on claims received by Broadspire and MetLife to also flow to UnitedHealthcare. The group health plan uses the information to conduct outreach to employees who can benefit from its services such as disease management, wellness or even catastrophic care services.

Delivering those services and others when employees need them most is a constant battle for employers, Mr. Shaughnessy said. But Textron’s strategy helps ensure that employees receive services when they need them most because three different service providers are evaluating their health needs all under the oversight of a nurse, Mr. Shaughnessy said.

“A lot of these services we offer can’t be triggered unless something happens,” he said. “So what we are doing is (watching for) those triggers, hopefully (reaching employees) sooner than later, when these services can have the biggest impact.”



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FACEBOOK LINKS FRIENDS TO AUTO SCAM

Facebook friendships unraveled a plot allegedly concocted by four women aiming to defraud auto insurers of nearly \$40,000, according to the California Department of Insurance.

Investigators allege the scheme began in 2011 when a 23-year-old woman rented a U-Haul truck and purchased additional insurance protection for the rental. A day later she was involved in an accident with a Toyota Yaris, driven by a 40-year-old woman who had two passengers in the car, both in their 20s.

All four claimed they suffered injuries while the three in the car claimed they didn't know the woman in the rental truck. The truck renter also claimed she didn't know the car occupants.

But investigators had to look no further than Facebook to find the foursome allegedly were friends.

Three were arrested and booked into the Sacramento County Jail on insurance fraud charges, including providing false statements in support of an insurance claim and participating in a vehicle collision for the purpose of submitting a false insurance claim, according to authorities.

Their bail ranges from \$20,000 to \$50,000 each. An arrest warrant has been issued for the fourth suspect with bail set at \$25,000.

If convicted on all counts, they could each serve two to five years in prison and have to pay a \$50,000 fine.

With Facebook friends like these women, who needs enemies?



CONTRIBUTING: Roberto Cenicerros, Matt Dunning, Mike Tsikoudakis, Rodd Zolkos

End Page



Faulkner Literary Rights alleges copyright infringement by of Sony Pictures, which paraphrased the author in the movie 'Midnight in Paris.'

Allen script sets scene for copyright battle

Faulknerian dramas center on such characters as Caddy Compson, Thomas Sutpen, Flem Snopes, and now, filmmaker Woody Allen.

Faulkner Literary Rights L.L.C., owner of the late William Faulkner's literary estate, alleged in a lawsuit that Sony Pictures Classics Inc. unfairly used a quote from the author in its 2011 film "Midnight in Paris," written and directed by Woody Allen.

In the lawsuit, filed last week in U.S. District Court for the Northern District of Mississippi, Western Division, in Oxford, Miss., Faulkner Literary Rights claimed that New York-based Sony Pictures inappropriately used Mr. Faulkner's famous quote, "The past is never dead. It's not even past," from his 1950 novel "Requiem for a Nun."

In the film, Owen Wilson's character, a Hollywood screenwriter vacationing in Paris says: "The past is not dead! Actually, it's not even past. You know who said that? Faulkner.

And he was right. And I met him, too. I ran into him at a dinner party."

Charlotte, Va.-based Faulkner Literary Rights alleged copyright infringement by Sony Pictures, which did not receive permission to use Mr. Faulkner's words before creating and distributing the film, according to the lawsuit.

The use of the quote "is likely to cause confusion, to cause mistake, and/or to deceive (the) film's viewers as to a perceived affiliation, connection or association between William Faulkner and his works, on the one hand, and Sony, on the other hand," according to the lawsuit.

Sony Pictures reportedly called the lawsuit "frivolous" and will defend itself against the allegations.

Faulkner Literary Rights seeks compensatory damages and punitive damages, among others.

Mr. Faulkner was awarded the Nobel Prize in Literature in 1949.



CANADA HIT WITH HUGE BILL FOR TRASHED HOTELS, CRASHED CARS

Census enumerator might not be at the top of the list of "rock 'n' roll" occupations, but one Canadian government employee appears to have designs on changing that perception.

According to a published report, among the claims paid by the Canadian government listed in a recent release of its 2012 public accounts was a \$4,000 Canadian (\$4,012) settlement to cover damage to a hotel room where a Statistics Canada enumerator stayed.

Among the other claims mentioned in the report was CA\$34,500 (\$34,600) paid by the Canadian Department of Fisheries and Oceans after losing leased scientific equipment at sea and CA\$390 (\$391) paid by the Canadian Senate to cover damages to a visitor's cellphone.

Far and away the most common – and expensive – claims were those involving various car accidents, which cost the government millions of dollars, according to the report.

Parks Canada reportedly paid more than CA\$1.1 million (\$1.1 million) in settling one car accident, and the Department of National Defense paid out total vehicle claims of CA\$1.9 million (\$1.9 million). There was also a CA\$1,610 (\$1,615) claim paid out by Environment Canada to cover damage to a shed after an employee hit it while driving a government vehicle.



TRUCK OWNER'S TALL STORY UNRAVELS AFTER CLAIM

A Minnesota man is finding out the hard way that the phrase "buyer beware" exists for a reason.

Bemidji, Minn., resident Mitchell Lewis Hill on Monday pleaded not guilty in a Beltrami County District Court to insurance fraud charges after allegedly trying to trick another driver and his insurer into paying for damage to his truck, according to a report in the Bemidji Pioneer newspaper.

On June 25, just a few hours after he had bought a used 2009 Chevrolet pickup truck, Mr. Hill allegedly told police that he had been involved in a hit-and-run collision with a white minivan and that one of the truck's rear passenger doors had been damaged in the accident, according to

the Pioneer.

However, the Minnesota state trooper who investigated the alleged crash said he couldn't find any evidence of a collision at the spot where Mr. Hill claimed to have been hit, the Pioneer said. The trooper also reported that the damage to the truck was too high off the ground to have been caused by another car, the paper said.

Two weeks later, Mr. Hill told police that he believed he had located the van that had allegedly hit him, but the state trooper said he didn't see any indication that the van had recently been involved in an accident, according to the Pioneer.

Ultimately, the trooper spoke to the

truck's previous owner, who told him that he was the one who damaged the truck. The former owner said he struck a pole while backing out of a parking lot, long before Mr. Hill bought the truck.

Nevertheless, state police learned in September that Mr. Hill had obtained an estimate for the damage and was attempting to convince the owner of the van to pay for the repairs and had filed a claim with his own insurer, the Pioneer said.

After his arrest, Mr. Hill allegedly admitted to state troopers that the van had never hit him, but had come close. It was only after the near-miss that Mr. Hill allegedly discovered the damaged door, the paper said.

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